86-564

No. .....

In The

Supreme Court of the United States

October Term, 1986

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of North Carolina

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Whether the District Court erred in holding that 42 U.S.C. § 602(a)(38), which requires that all child support payments are to be considered as household income (and thus assigned to the State) in determining eligibility of a family unit for AFDC benefits, results in a deprivation of property based on a child's unchosen family membership and therefore violates the Fifth and Fourteenth Amendments to the United States Constitution.

(2) Whether the District Court erred in ordering State Defendants to make retroactive payments to the identified class members when the amended statute mandated the conduct of the State Defendants and the Eleventh Amendment to the United States Constitution bars this award of retroactive payments.

PARTIES TO THE PROCEEDING

Phillip J. Kirk is the present Secretary of the North Carolina Department of Human Resources, and since the original filing of this action, the Department of Human Resources has assumed the functions carried out by the original defendant, North Carolina Board of Social Services; Secretary Kirk is accordingly the substitute party appellant for the North Carolina Board of Social Services, a public body corporate, and the individual members of said Board. C. Barry McCarty is the Chairman of the North Carolina Social Services Commission and is the substitute party appellant for Clifton M. Craig; the Social Services Commission promulgates State administrative regulations for the operation and administration of the State's programs of public assistance, including Aid to Families with Dependent Children (AFDC). State defendants' motion for leave to file a third-party complaint against Margaret Heckler, Secretary, U.S. Department of Health and Human Services in Her Official Capacity was granted on August 15, 1985; Federal defendant filed a motion to dismiss and in the alternative for summary judgment; by Memorandum of Decision entered May 7. 1986 the court held that state defendants were entitled to appropriate relief in their cross-action against the federal defendant and the court's Final Order entered July 14, 1986 enjoined the federal defendant to participate in its share of payments required under the Order; Otis R. Bowen, M.D. is the substitute party appellant for Margaret Heckler; federal defendant filed a Notice of Appeal to this Court on July 29, 1986. Party appellees other than Beaty Mae Gilliard are Samuel Odell Davis, Lorraine Gilliard, Loretta Gilliard, Thomas Gilliard, Dana Gilliard, Gregory Gilliard, Reginald Gilliard, and Samuel Davis Jr. Gilliard, minors, by their mother and next friend, Beaty Mae Gilliard. These respondents sought to represent a class of applicants for and recipients of Aid to Families with Dependent Children (AFDC); this class was certified as a class as defined in the original judgment entered on December 10, 1971.

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BEATY MAE GILLIARD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of North Carolina

JURISDICTIONAL STATEMENT

The Attorney General of North Carolina, on behalf of the Secretary of the North Carolina Department of Human Resources and the Chairman of the North Carolina Social Services Commission, in their official capacities, appeals from the Final Order of the United States District Court for the Western District of North Carolina, entered July 14, 1986, holding that 42 U.S.C. § 602(a)(38) is unconstitutional as being violative of the Fifth and Fourteenth Amendments to the Constitution of the United States. The District Court also ordered the State Defendants, with participation by the Federal Defendant, to

make retroactive payments to individual members of the class of AFDC applicants or recipients.

OPINIONS BELOW

The Memorandum of Decision of the District Court for the Western District of North Carolina is reported at 633 F.Supp. 1529 (W.D.N.C. 1986). (App. A, *infra*, A1-A80). An Order which clarified the Memorandum of Decision, filed July 3, 1986, is not reported and is reprinted in the Appendix hereto. (App. A, *infra*, A81-A86).

JURISDICTION

The Judgment of the District Court for the Western District of North Carolina was entered on July 14, 1986 (App. C, *infra*, A121) in accordance with the Final Order of the Court filed July 3, 1986. (App. C, *infra*, A122-A127). Notice of Appeal to this Court was timely filed in the District Court for the Western District of North Caroline on August 1, 1986. (App. D, *infra*, A132-A136). A Motion to Stay Pending Appeal was entertained by the District Court and granted on August 25, 1986. (App. E, *infra*, A148-A154). A Motion for Reconsideration was entertained and denied by the District Court on August 25, 1986. (App. C, *infra*, A128-A131). A supplementary Notice of Appeal to this Court was timely filed in the District Court for the Western District of North Carolina on September 2, 1986. (App. D, *infra*, A137-A140).

This appeal is being docketed within sixty days of the August 1, 1986 Notice of Appeal and of the September 2, 1986 Notice of Appeal.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1252 which authorizes a direct appeal to this Court from an interlocutory or final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party.

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CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Eleventh Amendment, United States Constitution:

> The judicial power the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Relevant provisions of the Social Security Act, Title 42 of the United States Code, involved in this case are reproduced at Appendix F, *infra,* A155-A165. Relevant provisions of the North Carolina General Statutes, Chpts 50, 108A, and 110, involved in this case are also reproduced at Appendix F, *infra,* A165-168.

STATEMENT OF THE CASE

Plaintiffs are individuals who were affected by a determination of the Mecklenburg County Department of Social Services that the AFDC recipient family headed by Mrs. Beaty Mae Gilliard came under regulations of the North Carolina Department of Social Services which included the child support received by a child as an available resource in the budget income of the Gilliard family. The amount of income, together with resources, available to the family determines, in the first instance, the eligibility of the family for AFDC benefits, and once eligibility is established, the family income determines the amount of AFDC benefits which the family will re-

ceive. 42 U.S.C. § 602(a)(7); 42 U.S.C. § 602(a)(8). (App. F, *infra*, A157-A163).

On May 5, 1970, the Plaintiffs filed a complaint in the United States District Court for the Western District of North Carolina challenging the legality of considering such child support income as being in fact income available to the entire family. A three-judge court entered a final judgment in favor of the plaintiffs, holding that both under a rational interpretation of the federal statute and North Carolina's own regulation, it was improper to include child support payments as family income. *Gilliard v. Craig*, 331 F.Supp. 587 (1971), *aff'd without opinion*, 409 U.S. 807 (1972). Thus, under the District Court's interpretation of the Social Security Act, North Carolina was required to give heads of AFDC households the option to include in or exclude from their AFDC units any co-resident half-sibling who received child support.

In 1984 the United States Congress adopted the Deficit Reduction Act (DEFRA) which amended the Social Security Act provisions on which *Gilliard v. Craig, supra*, was based. DEFRA's section 2640 added 42 U.S.C. § 602 (a)(38) (App. F, *infra*, A164) to the Social Security Act, requiring that any parent and any sibling or half-sibling of a child applying for or receiving AFDC must be included in the AFDC filing unit. As a result of 42 U.S.C. § 602(a)(38) any income of or available for individuals in the filing unit must be included in determining the eligibility of the unit for AFDC benefits. In October of 1984 the State of North Carolina implemented the new DEFRA provisions.

On May 30, 1985, Plaintiffs filed a motion for further relief asking for an order enforcing the permanent in-

junction issued by the three-judge court in 1971. Plaintiff's motion alleged that the consideration of child support payments for a minor sibling residing in an AFDC household, as being available income for the filing unit, was in violation of the original injunction because of Defendants' improper interpretation of 42 U.S.C. § 602(a)(38) or, in the alternative, that 42 U.S.C. § 602(a)(38) was unconstitutional. State Defendants' motion for a three-judge panel was denied, but their motion to file a third-party complaint against the United States Department of Health and Human Services was granted on August 15, 1985. (App. E, *infra* A141-A143).

By Memorandum of Decision dated May 7, 1986 (App. A, *infra*, A1-A80) and Orders filed July 3, 1986 (App. A, *infra*, A81-A86; App. C, infra, A122-A127), the District Court held that the Defendants had properly interpreted 42 U.S.C. § 602(a)(38) by requiring child support income of co-resident siblings to be included as a family resource. However, the District Court further held that the Defendants would be enjoined from implementing the mandates of the statute because "it imposes a financial penalty on children receiving adequate child support while living in families composed of their mothers and their AFDC dependent half-brothers and half-sisters. Such a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles." (Appendix A, *infra*, page A82). In reaching this decision the District Court applied a "heightened scrutiny" standard of review and thus rejected this Court's long and consistent line of cases which state that the proper standard for judicial review for due process and equal protection challenges to social welfare legislation is "minimal

scrutiny." (Appendix A, *infra*, A59-A62). In addition to declaring 42 U.S.C. § 602(a)(38) unconstitutional and enjoining its implementation, the Court also ordered the Defendants to pay retroactive AFDC benefits to individual members of the class. On August 25, 1986, the Court stayed its Order pending appeal but refused to reconsider its original Order. (App. E, *infra*, A144-A154). The Defendants have timely filed Notice of Appeal from the Final Order and from the denial of the Motion for Reconsideration. (App. D, *infra*, A132-A140).

THE QUESTION IS SUBSTANTIAL

The question raised by the District Court as to the constitutionality of 42 U.S.C. § 602(a)(38) is a substantial one, not only for the State of North Carolina but also for the entire AFDC program across the Nation. The Order of the District Court which mandates the payment of retroactive benefits by the State of North Carolina also presents a substantial question since it is in direct conflict with the established principle, stated by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), that such retroactive monetary relief is barred by the Eleventh Amendment to the United States Constitution.

The District Court's Order enjoining 42 U.S.C. § 602 (a)(38) upon the reasons stated in the Memorandum of Decision (App. A, *infra*, A1-A80) and Clarification Order (App. A, *infra*, A81-A86) is in serious error for several reasons. First, in the Memorandum of Decision the Court specifically stated that the defendants were "mistaken in their contention that their actions involve only minimal

scrutiny" and then found that 42 U.S.C. § 602(a)(38) of the Social Security Act was violative of due process and equal protection principles by applying a "heightened scrutiny" standard of review. This is in direct conflict with the long and consistent line of opinions of this Court which point unerringly to the principle that the proper standard for judicial review of social legislation is *minimal scrutiny*. *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Schweiker v. Wilson*, 450 U.S 221 (1981); *Califano v. Jobst*, 434 U.S. 47 (1977); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Jefferson v. Hackney*, 406 U.S. 535, *reh'g denied*, 409 U.S. 898 (1972); *Dandridge v. Williams*, 397 U.S. 471, *reh'g denied*, 398 U.S. 914 (1970). Significantly this Court has recently reaffirmed the minimal scrutiny standard in *Lyng v. Castillo*, — U.S. —, 106 S.Ct. 2727 (1986). Upon reasoning very analogous to that utilized below in *Gilliard*, in *Lyng* the District Court invalidated 7 U.S.C. § 2012(i), a statutory provision in the Food Stamp Program which defined "household" as parents, children and siblings who live together as a single household unit. The District Court held that the statute was an unconstitutional infringement upon familial association by applying a "heightened scrutiny" standard. This Court reversed the lower Court decision, ruling that the District Court erred in appraising the constitutionality of the provision under "heightened scrutiny" since close family members are not a "suspect" or "quasi-suspect" class and the statutory classification does not directly and substantially interfere with family living arrangements and thereby burden a fundamental right. *Lyng* applied the well-settled principle that social welfare legislation will be upheld if it is "rationally related to a legitimate legislative objec-

tive." *Weinberger v. Salfi,* 422 U.S. 749 (1975). This Court has recognized that the very nature of social welfare legislation necessitates drawing sometimes arbitrary lines among categories of people but as long as the classification has a reasonable basis, it does not violate the Constitution. *Califano v. Aznavorian,* 439 U.S. 170 (1978); *Dandridge v. Williams,* 397 U.S. 471, *reh'g denied,* 409 U.S. 898 (1970). Governmental action that may deny a property owner some beneficial use of his property or that may restrict the owner's full exploitation of the property has been upheld if such public action is justified as promoting the general welfare. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980). The AFDC family filing unit mandated by 42 U.S.C. § 602(a)(38) is rationally related to numerous legitimate governmental interests, including the reduction of federal expenditures, the realignment of a family member's need determination with the realities of shared household expenses, the limitation of scarce public funds to those most in need, and the reduction of costs to the AFDC program in individual eligibility determinations. By applying an incorrect standard of review to the AFDC legislation promulgated by Congress in 42 U.S.C. § 602(a)(38), the *Gilliard* decision has erroneously nullified an Act of Congress on grounds that have no basis in the decisions of this Court.

Second, the District Court erred in holding that there had been an uncompensated "taking" of a private property right created under state law. North Carolina has chosen to participate in the AFDC program which is a cooperative federal-state undertaking to furnish financial assistance to certain needy children and the parents or relatives with whom they live. N.C.G.S. § 108A-25 (App. F.

infra, A166) creates AFDC as a program of public assistance to "be administered . . . under federal regulations. . . ." N.C.G.S. § 108A-27 (App. F, *infra,* A167) states that the AFDC program "is to be administered by county departments of social services under federal regulations and rules and regulations of the Social Services Commission." As a voluntary participant in the AFDC program, North Carolina has adopted federal laws governing the program. Cf., *Lackey v. Department of Human Resources,* 306 N.C. 231, 293 SE2d 171 (1982) (Medicaid regulations). Thus, the law of North Carolina regarding child support of AFDC recipients is that child support income is to be considered in determining the eligibility of the AFDC filing unit, 42 U.S.C. § 602(a)(38) (App. F, *infra,* A164), and that in order for the AFDC unit to be eligible for benefits, there must be an assignment of child support rights for all children included in the assistance unit, 42 U.S.C. § 602(a)(26)(A). (App. F, *infra,* A163). Importantly, the federal law in this area as adopted by the State does not create an irreconcilable conflict with any other State law. N.C.G.S. § 50-13.4(d) (App. F, *infra,* A165) states that child support payments are to be made "to the person having custody . . . for the benefit of such child." The custodian of the minor child is regarded as a "trustee" of the support funds and as such is bound to use fiduciary discretion in applying these funds to benefit the child. *Goodyear v. Goodyear,* 257 N.C. 374, 126 SE2d 113 (1962). Absent a glaring breach of fiduciary duty such as an attempt to "profit" from the funds, *Goodyear, supra.,* the trustee of a minor child's support funds is free to use the funds in any rational way which the trustee determines in his fiduciary discretion will best benefit the child.

North Carolina clearly recognizes a parent's right to the companionship, care, custody and *management* of his or her children. *Re Lassiter,* 43 N.C.App. 525, *appeal dismissed* 299 N.C. 120 and affirmed 452 U.S. 18 (1981). Obviously, a trustee could determine reasonably and rationally that it would be in the best interests of the child that an assignment of the right to support be made to the State in order to maintain family integrity and the whole family's standard of living by obtaining public assistance which benefits every member of the family in which the child lives. *The legal obligation of the non-custodial parent to continue to pay child support under N.C.G.S. § 50-13.4(d) is not affected by 42 U.S.C. § 602(a)(38).* The District Court's decision in *Gilliard,* with its attendant emphasis on the superior private property rights of the child, would effectively nullify all AFDC assignment provisions mandated by federal law. 42 U.S.C. § 602(a)(26)(A), (App. F, *infra,* A163) and by the law of North Carolina, N.C.G.S. § 110-35 and § 110-37. (App. F, *infra,* A167-A168). Such a drastic result would be patently in opposition to the interests of the tax paying public of this country and merits review by this Court in order that this result may be explicitly rejected.

Third, there has been no direct effect on a constitutionally protected right. There is no constitutional right to receive public assistance. *Harris v. McRae,* 448 U.S. 297 (1980). Congress can make eligibility rules for receiving public assistance if the rules are rationally related to a legitimate legislative objective. *Weinberger v. Salfi,* 422 U.S. 749 (1975). There is no direct taking of child support mandated by 42 U.S.C. § 602(a)(38). Rather, the statutory scheme merely sets out various provisions which determine a family's eligibility for AFDC. This Court

has previously rejected constitutional challenges to similar conditions of eligibility for public assistance, emphasizing the voluntary right of the potential AFDC recipient to refuse to accede to certain conditions of eligibility with the consequence of refusal being the cessation of public assistance. *Wyman v. James*, 400 U.S. 309 (1971). Clearly, the custodian of the minor child, as trustee, has the natural right to make the voluntary choice to comply with the AFDC conditions of eligibility or not as determined to be in the best interests of the child. The directives of 42 U.S.C. § 602(a)(38) establish conditions of eligibility which can result in an assignment of the right to support but no direct taking has been mandated.

Review of the *Gilliard* decision is also necessary because of the conflicting decisions which are coming from the federal courts in construing 42 U.S.C. § 602(a)(38). Importantly, the *Gilliard* court's determination that "heightened scrutiny" is the appropriate standard of review is in direct conflict with this Court's reasoning in *Lyng v. Castillo*, — U.S. —, 106 S.Ct. 2727 (1986). The *Gilliard* decision also is in conflict with a Ninth Circuit opinion in *Vance v. Hegstrom*, 793 F.2d 1018 (9th Cir. 1986), which acknowledged the valid and controlling authority of 42 U.S.C. § 602(a)(38) for AFDC purposes but held the inclusion of sibling income to be invalid in a Medicaid decision. A cursory review of the various District Court decisions nationwide also reveals the controversy surrounding the interpretation of 42 U.S.C. § 602(a)(38).[1]

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[1] *Ardister v. Mansour*, 627 F.Supp. 641 (W.D. Mich. 1986): Court held there were no due process or equal protection violations by Congress' reallocation of AFDC benefits deeming OASDI or Title II benefits of children under 42 U.S.C. § 602(a)(38).

(Continued on following page)

The judicial conflict created by this legislation points out the importance of the question involved and the necessity of review by this Court.

In addition to the District Court's erroneous analysis of 42 U.S.C. § 602(a)(38), the Court committed a fundamental error in ordering the Defendants to make retroactive payments to the individual class members whose benefits were denied, reduced or terminated as a result of the enforcement of 42 U.S.C. § 602(a)(38). This Order is in direct contradiction to the clear mandates of this Court

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(Continued from previous page)

White Horse v. Heckler, 627 F.Supp. 848 (D.S.D. 1985): Court held 42 U.S.C. § 602(a)(38) invalid in child support or OASDI benefits in light of conflicts in federal law; Court did not reach the constitutional issues presented.

Oliver v. Ledbetter, 624 F.Supp. 325 (N.D. Ga. 1985): Consideration of OASDI benefits in determining need under 42 U.S.C. § 602(a)(38) does not violate equal protection or due process rights.

Sherrod v. Hegstrom, 629 F.Supp. 150 (D. Or. 1985): Provisions of 42 U.S.C. § 602(a)(38) presented no equal protection or due process violations.

Frazier v. Pingree, 612 F.Supp. 345 (D.C. Fla. 1985): Construing federal statutes, Court held that OASDI benefits may not be deemed under 42 U.S.C. § 602(a)(38).

Creaton v. Heckler, 625 F.Supp. 26 (C.D. Cal. 1985): OASDI benefits are properly included in the standard filing unit under 42 U.S.C. § 602(a)(38); no due process violations.

Johnson v. Cohen, — F.Supp. — (D.C. Pa. 1986): 42 U.S.C. § 602(a)(38) constitutes a taking of support money without just compensation and violates procedural due process in the absence of a pre-deprivation hearing.

Shonkwiler v. Heckler, 628 F.Supp. 1013 (S.D. Ind. 1985): Section 2640(a) of the Deficit Reduction Act and the Secretary's regulation implementing the statutory provision are not constitutionally infirm.

Sundberg v. Mansour, 627 F.Supp. 616 (W.D. Mich. 1986): 42 U.S.C. § 602(a)(38) is not applicable to determining eligibility for Medicaid.

Gorrie v. Heckler, 624 F.Supp. 85 (D. Minn. 1985): 42 U.S.C. § 602(a)(38) violates procedural due process.

that the payment of retroactive funds out of a state treasury to private parties is barred by the Eleventh Amendment. *Edelman v. Jordan,* 415 U.S. 651 (1974); *Quern v. Jordan,* 440 U.S. 332 (1979). The recent decision by this Court in *Green v. Mansour,* — U.S. —, 106 S.Ct. 423 (1985) addressed a similar factual situation as is presented in the *Gilliard* Order. *Green* involved an amendment to the federal legislation governing the AFDC program. This Court held that following the change in the federal law, the Eleventh Amendment would forbid retroactive relief in the form of money damages or restitution.

The *Gilliard* Opinion of the North Carolina District Court indicates that retroactive damages were properly ordered because at the time the State Defendants began following the new directives of 42 U.S.C. § 602(a)(38), they were still bound by the 1971 injunction entered under the old law. The cases relied upon by the District Court to reach this decision are inapposite. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976); *Walker v. City of Birmingham,* 388 U.S. 307 (1967); *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). The foregoing opinions of this Court do not involve retroactive payments out of a state treasury nor do they address the effect upon an injunction when the law in effect at its imposition has been amended by an Act of Congress. Rather, this Court's opinion in *State of Pennsylvania v. Wheeling and Belmont Bridge Company,* 18 How. (59 U.S.) 421 (1855), controls the specific factual situation presented by *Gilliard.* In *Wheeling Bridge* this Court held that the defendants who were enjoined from doing a certain act were entitled to rely on subsequent changes in a statute from the date of the statute's enactment and could change their conduct accordingly in reliance upon the presumed constitutionality of the statute from the date of its

enactment without petitioning the Court for a modification of the old injunction. The 1971 decision in *Gilliard v. Craig*, 331 F.Supp. 587 (1971), being premised solely on statutory grounds, was reversed by Congressional action amending the statute through its enactment of 42 U.S.C. § 602(a)(38). *See, United States v. Kubrick*, 444 U.S. 111 (1979); *United States v. South Buffalo Railway Co.*, 333 U.S. 771. (1948). Moreover, the original decision in *Gilliard v. Craig* simply enjoined the State of North Carolina from including coresident children's income as a family resource because the Social Security Act as then written forbade this conduct. The State Defendants were ordered to correctly follow the Social Security Act (App. B, *infra*, A87-A114). Therefore, in effect, the State Defendants indeed were following the original 1971 injunction by modifying their actions in compliance with the amended directives of the Social Security Act. No violation of the injunction has occurred. For all of the above reasons, the District Court committed a fundamental error in awarding the retroactive payments.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

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APPENDIX A

GILLIARD v. KIRK

Cite as 633 F.Supp.1529 (W.D.N.C. 1986)

Beaty Mae GILLIARD; Samuel Odell Davis; Lorraine Gilliard; Loretta Gilliard; Thomas Gilliard; Dana Gilliard; Gregory Gilliard; Reginald Gilliard; and any Samuel Davis Jr. Gilliard, minors, by their mother and next friend, Beaty Mae Gilliard, on behalf of themselves and all others similarly situated, Plaintiffs.

v.

Phillip J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. Barry McCarty, Chairman, North Carolina Social Services Commission, in his official capacity, Defendants and Third-Party Plaintiffs,

v.

Otis R. BOWEN, M.D., Secretary United States Department of Health and Human Services, Third-Party Defendant.

Civ. A. No. 2660
United States District Court,
W.D. North Carolina,
Charlotte Division.
May 7, 1986.

Children of low income mothers sought to enjoin state and federal officials from enforcing child support attribution regulations imposed for aid to families with dependent children program and sought retroactive payment of benefits, and state officials filed third-party complaint against federal officials for contribution. The District Court, McMillan, J., held that: (1) federally sanctioned state requirement that mothers seeking AFDC benefits for their

unsupported children had to assign to the state the child support rights of adequately supported child unconstitutionally deprived supported child of his or her property interests in his or her child support; (2) reduction of governmental deficits did not justify punishing child for exercising his or her fundamental right to live with his or family; and (3) state officials would be ordered to pay retroactive AFDC benefits to all families in state whose benefits were denied, reduced or terminated as result of child support attribution regulations, with state officials entitled to appropriate relief from federal officials.

Order in accordance with opinion.

Jane R. Wettach, East Central Community Legal Services, Raleigh, N.C., and Lucie C. White and Jean M. Cary, University of North Carolina School of Law, Chapel Hill, N.C., for plaintiffs.

Lemuel W. Hinton and Clifton H. Duke, Asst. Attys. Gen., N.C. Dept. of Justice, Raleigh, N.C., for defendants and third-party plaintiffs.

Charles R. Brewer, U.S. Atty., Charles E. Lyons, Asst. U.S. Atty., Charlotte, N.C., Bruce R. Granger, Regional Atty., and Edgar M. Swindell, Asst. Regional Atty., Dept. of Health and Human Services, Atlanta, Ga., for third-party defendant.

MEMORANDUM OF DECISION

McMILLAN, District Judge.

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I. SUMMARY OF DECISION

Plaintiffs are children of low income mothers. They bring this suit through their mother and next friend, on behalf of themselves and similarly situated persons. Not all the children of each mother have the same father. Some of the children are "needy," and have been receiving AFDC (Aid to Families with Dependent Children) payments. Some of the children are not "needy" because their absent fathers are making adequate child support payments to the mother.

The state defendants, acting under a rational interpretation of pertinent recent federal statutes and regulations, are "deeming" the support payments from absent fathers to be income available to all the dependent children in the house. Defendants are cutting off or reducing AFDC payments accordingly, with tragic results shown by the evidence.

This is an unlawful "taking" of the child's income from an absent father. It also unlawfully deprives the other children in the family of AFDC benefits by destroying or reducing their entitlement because one of the mother's children who has income of his or her own exercises his or her right to live in the mother's family unit.

Regardless of whether federal pre-emption in a technical sense has occurred, the federal scheme has, in fact, overpowered state family law, and has undermined traditional understandings of family values and duties.

Plaintiffs seek an end to the "deeming" practice. They are entitled to relief.

II. CASE HISTORY

This case has been here before. In *Gilliard v. Craig,* 331 F.Supp 587 (W.D.N.C. 1971) (three judge court), this court enjoined the state defendants from reducing or withholding "the payment of AFDC [Aid to Families with Dependent Children] benefits . . . because of the presumed availability to an AFDC family of [child] support payments which belong to one or more but not all members of that family." *Id.* at 593-94. That decision was appealed to the Supreme Court and was affirmed. 409 U.S. 807, 93 S.Ct. 39, 34 L.Ed.2d 66 (1972), *reh. den., Craig v. Gilliard,* 409 U.S. 1119, 93 S.Ct. 892, 34 L.Ed.2d 704 (1973). The 1971 injunction remains in effect because it has not been stayed, vacated, withdrawn or reversed. *Walker v. City of Birmingham,* 388 U.S. 307, 313-14, 87 S.Ct. 1824, 1828, 18 L.Ed.2d 1210 (1967); *United States v. United Mine Workers of America,* 330 U.S. 258, 293-14, 67 S.Ct. 677, 695-706, 91 L.Ed. 884 (1947); *Wright v. Jackson,* 522 F.2d 955, 958 (4th Cir. 1975). Consequently, the state defendants remain subject to the commands of the original injunction pending modification or reversal. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 439-40, 96 S.Ct. 2697, 2706, 49 L.Ed.2d 599 (1976).

The 1971 class of plaintiffs was

> "persons who have been or may be subject to a reduction of AFDC (Aid to Families with Dependent Children) benefits based upon unconstitutional or illegal claim of credit by administering agencies for outside income and other resources available to some but not all of a family group."

Gilliard v. Craig, supra, at 588..

The plaintiffs (movants) are members of the same class that was granted relief in 1971. They have filed a

motion for further relief, seeking the same sort of relief that was ordered in 1971.

III. THE PRESENT CONTROVERSY; THE TEXT OF THE CHALLENGED NEW STATUTE AND REGULATIONS

On October 10, 1984, the state defendants put into effect a set of new regulations ("Standard Filing Unit" or "SFU" regulations) reading, in pertinent part, as follows:

> *Standard Filing Unit*
>
> A. The parent and all minor children who are brothers and sisters, including half-brothers and sisters, and who are living together *must be* included in the same assistance unit unless:
>
> 1. The parent or child is an SSI recipient, or
>
> 2. The parent or child does not meet all eligibility factors with the exception of income and reserve. Do not exclude a parent or child because of the amount of income or reserve he has.

Section 2360 III A, State 1985 AFDC Manual (emphasis added) [attached to Plaintiff's Motion For Further Relief].

Implementation of the "Standard Filing Unit" (SFU) regulations triggers the operation of two additional regulatory requirements. According to Section 2350 II of the North Carolina AFDC Manual, the income of all members of the assistance unit is counted as available to the whole unit. Section 2365 II requires that the caretaker of a child in an AFDC filing unit assign to the state any rights to support owed or paid on his or her behalf or on

behalf of other family members for whom assistance is requested. Thus, once a child receiving child support income becomes a member of the filing unit as is required by the SFU regulations, the state gains access to that child's income for purposes of reducing the family assistance budget and the state expenditure to the family.

Plaintiffs allege that the new regulations violate the original injunction of this court and the Social Security Act, and wrongfully deprive them of previously available AFDC benefits.

The state asserts that it promulgated and enforced the "Standard Filing Unit" (SFU) regulation in obedience to and in implementation of 42 U.S.C. § 602(a)(38) (Supp. II 1984) [part of "DEFRA," the 1984 federal Deficit Reduction Act]. That section states that a state AFDC plan "*must*":

> "(38) provide that in making the determination under paragraph (7) with respect to a *dependent child* and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> "(A) any parent of such child, and
>
> "(B) any brother or sister of such child if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any *income of or available for* such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) . . . ." [Emphasis added.]

Section 606(a), referred to in the preceding quotation, defines "dependent child":

"(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training) . . . ."

Paragraph 7 of Section 602 describes the determination of need by the state agency and provides, in relevant part, that such a state plan *must*

"(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency—

"(A) *shall,* in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid; . . . ." [Emphasis added.]

Paragraph 8(A) then requires that the state agency, in making the determination of need for an applicant family:

> "(vi) shall *disregard* the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title); . . . ." [Emphasis added.]

(These $50.00 items are referred to as "income disregards" or "disregards.")

The statutory modification worked by Section 602(a)(38) was implemented and explained by regulations from the Department of Health and Human Services. Those regulations, 45 C.F.R. § 206-10(a)(1)(vii) (1985), provide:

> "(vii) For AFDC only, in order for the family to be eligible, an application with respect to a dependent child *must* also include, if living in the same household and otherwise eligible for assistance:
>
> > "(A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
> >
> > "(B) Any blood-related or adoptive brother or sister." [Emphasis added.]

After pointing to these federal instructions, the state asserts that training sessions and discussions with officials from the Department of Health and Human Services in Atlanta, Georgia, and Washington, D.C., have confirmed the state's belief that no action was required by the federal legislation. *See* Affidavit of Kay Fields, Chief, Assistance Payments Section, Division of Social Services, North Carolina Department of Human Resources, p. 2. The state defendants have therefore filed a third-party complaint against the Secretary, seeking contribution from the federal

government if the court finds the state has acted improperly and orders the payment of additional benefits.

IV. HOW PLAINTIFFS ARE BEING INJURED BY THE NEW STATUTE AND REGULATIONS

After the state SFU regulations went into effect in October, 1984, the state sent out letters to AFDC recipients who had children in their households who had not been included in the filing unit. These letters stated:

> "Prior to October 1, 1984, family members who lived together were not required to apply for AFDC benefits for everyone. A parent could choose to include or exclude himself or herself and any of the children.
>
> "However, the Deficit Reduction Act of 1984, Public Law 98-369, passed by Congress, requires a change in this rule effective October 1, 1984. Section 402(a)(38) of the Act and Sections 2200 and 2360 of the AFDC Manual state that a parent and all brothers and sisters, including half brothers and sisters, who are living in the same household must apply for AFDC with certain exceptions. Any income of assets of the parent and the children are counted in determining eligibility for the family.
>
> "Our record shows that your family is probably affected by the change in federal law. Therefore, you must contact your worker by _____ to apply for
> (Date)
> everyone who is required to be in the payment. If you do not contact your worker by this date, your AFDC and Medicaid will be stopped."

Upon contacting their local welfare office, recipients like the plaintiffs were informed that they had to include all children in the filing unit and the child support income received by previously excluded children would now be

deducted from the payment amount of a recalculated grant for the new larger AFDC unit. The mother or caretaker would receive only a $50 "disregard" from the child suport paid to her on behalf of a previously excluded child. The mother or caretaker was required to sign a form entitled "Assignment of Rights to Support," which authorized the payment of a court ordered support amount for the newly included child[ren] directly to the North Carolina Department of Human Resources. Any support paid directly to the mother or caretaker had to be reported to the county department of social services and that amount, less the $50 "disregard," would then be counted as income when the AFDC grant was calculated.

State defendants estimate that enforcement of the SFU regulations would result in "termination or reduction of benefits to about 11.3% of AFDC cases in North Carolina. . . . 7,730 cases would be adversely affected, with an annual loss of benefits ranging between $3.0 and $4.7 million annually." *See* Division of Social Services, Planning and Information Section, August 22, 1984 Memorandum, which is Attachment 1 to Memorandum of Law in Support of Plaintiffs' Motion for Further Relief.

The affidavits submitted by the plaintiffs demonstrate how these federal and state directives have been implemented in North Carolina and how the interlocking state and federal plans have affected the income and lives of families like those of the plaintiffs:

1) Diane Thomas has two children, Crystal, age 9, and Sherrod, age 7. Ms. Thomas, age 32, has been unable to find gainful employment although she looks constantly for work. She states:

"4. James Edward Shaw is the father of Crystal. By virtue of a Wake County Court Order, 78 CVD 5056. Mr. Shaw is required to pay $20 a week toward Crystal's support. He almost never complies with the Order, however, and Crystal has been on public assistance for her whole life.

"5. John Pennigton is the father of Sherrod. Although there is no civil court order requiring him to do so, Mr. Pennington has regularly paid $200 a month in child support for Sherrod.

"6. Prior to October, 1984, I received an AFDC grant for myself and my daughter Crystal in the amount of $194.

"7. On October 15, 1984, I received a letter notifying me that if I did not reapply for AFDC and include my son Sherrod in the application, the AFDC for Crystal would be terminated.

"8. I did not reapply for AFDC and my assistance was terminated. The reason I did not reapply is that Sherrod's father had on an earlier occasion threatened to harm me physically if I put his son on welfare. He also threatened to attempt to obtain custody of Sherrod.

"9. I asked for a fair hearing to challenge the termination of AFDC. The state hearing officer upheld the decision of the country to terminate my AFDC."

After the hearing mentioned by Ms. Thomas, the hearing officer filed a report in which he noted:

"On October 15, 1984 the county agency notified appellant by letter that her non-assistance child must be added to the budget unit because of a change in regulations. Appellant did not wish to include this child in the assistance grant and requested a local hearing on October 18, 1984 to appeal this action. A hearing in the matter was held on October 26, 1984 and on that

same date a decision was rendered affirming the county's requirement to include this child in the grant. Appellant did not apply for assistance for this child, and her grant was terminated on October 29, 1984 effective November 30, 1984."

The hearing officer also found as facts the following:

"Appellant's son and daughter have different fathers. . . . The father of the male child pays court ordered child support of $200 per month. These payments are made regularly and are routed through the clerk of court's office.

"The Wake County Department of Social Services informed the appellant on October 18, 1984 that new federal regulations required that the male child be included in the Aid to Families with Dependent Children grant and that if application for the child were not made, the grant would be terminated. Appellant did not apply for her son, and her assistance was terminated effective November 30, 1984.

"Appellant contends that her son's needs are met by his support payments and that he does not require assistance. She further contends that she is required by law to use her son's support money solely for his support and maintenance. The son's father has expressed very negative feelings about having his child receive public assistance when he is providing adequate support for the child."

Despite Ms. Thomas's objections, the hearing officer upheld the termination. He found that the county had correctly implemented the SFU regulations, which he found to be consistent with the governing federal regulation; 45 C.F.R. § 296.10(a)(1)(vii)(B) (1984).

Ms. Thomas' May 2, 1985, affidavit continues:

"10. Because I had no money with which to support Crystal, I finally reapplied for benefits in Febru-

ary, 1985. I included Sherrod on the application as I was required to do, and signed an assignment of Sherrod's support rights to the state.

"11. As of April 11, 1985, John Pennington began to withhold the child's support for Sherrod. He informed me that as long as I was going to use Sherrod's support money to keep up my daughter Crystal, he would continue to withhold the support.

"12. Because I was receiving $200 a month for Sherrod, my AFDC grant was reduced to $73 a month. I could not support Crystal on this amount, so I was forced to use some of Sherrod's support to meet Crystal's needs.

"13. Since my AFDC was terminated in November, 1984, I have been unable to purchase clothing and other necessary items for my children. Our phone service was disconnected in December because I could not pay the bill. I currently have overdue accounts for lights and gas.

"14. Because I have been unable to support both children, members of my family have been providing some assistance. They have their own families and obligations, however, and cannot continue supporting me on an indefinite basis."

By supplemental affidavit, dated September 16, 1985, Ms. Thomas further described her situation:

"1. I have received no direct child support from John Pennington, the father of my son, Sherrod, since April 11, 1985.

"2. I was informed by my worker in the Wake County IV-D Unit that she had a meeting with John Pennington about support for Sherrod. On May 22, 1985, John Pennington signed a Voluntary Support Agreement and Order in Wake County 85 CVD 3433.

This Agreement requires him to pay child support of $87 month, beginning 7/1/85.

"3. As far as I know, John Pennington did pay the support due for July, because I received a $50 disregard check at the end of August.

"4. Since April, 1985 when Mr. Pennington stopped paying support voluntarily, he has not visited Sherrod. Prior to that time, he visited Sherrod on a regular basis, generally taking his son with him to his home in Durham every other weekend.

"5. Mr. Pennington is extremely opposed to his son being on welfare benefits, and has told me that he stopped seeing his son because I now receive AFDC for Sherrod.

"6. Sherrod is very upset that his father no longer visits him. He frequently asks me why his daddy does not come to see him anymore. Since the time his father has stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined.

"7. It is my opinion that the lack of visitation with his father has severely affected Sherrod, causing the bedwetting, disruptive behavior and poor school performance. I cannot think of any other aspects of Sherrod's life which have changed or might have caused these behavorial problems."

2) Mary Medlin is the 30-year-old mother of four children, Anthony Medlin, age 14; Roderick Medlin, age 13; Karen Medlin, age 10; and Jermaine Medlin, age 1. Unable to find a full- or part-time job, Ms. Medlin has no earned income. Ms. Medlin states:

"4. John Sanders is the father of Anthony Medlin and Roderick Medlin. His paternity has never

been legally established and he has never supported Anthony or Roderick.

"5. Bobby Harrington is the father of Karen Medlin. On January 4, 1980, he signed a Voluntary Support Agreement in Wake County 80 CVD 0053, agreeing to pay $39 a week. During early 1984, he regularly paid about $320 every three months. On August 20, 1984, the court ordered that he pay $200 a month, with $40 a month assigned to arrearages which had built up and $160 a month to current support. He began paying $200 a month in September, 1984.

"6. James Richardson is the father of Jermaine. Since Jermaine was born, Mr. Richardson has provided direct support to his son, purchasing clothing and diapers, contributing to my household bills and paying me $50 cash as child support. A criminal action for support in Wake County, 85 CR 10961 is currently pending against him, because he has refused to sign a voluntary support agreement.

"7. Prior to October, 1984, I received AFDC for myself and my two older children, in the amount of $223.

"8. After October 1, 1984, I was informed by the Wake County Department of Social Services that my AFDC grant would be terminated unless I added Karen and Jermaine to the application.

"9. Although I did not want to put Karen or Jermaine of AFDC, I did apply for them because it was the only way I could receive any income for myself and my other two children.

"10. After I applied with everyone on the application, my whole grant was terminated. The Department of Social Services informed me that because I received $200 in child support for Karen and $50 in child support for Jermaine, my whole family was ineligible.

"1. When I added the two younger children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS-1201) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"12. Because both Bobby Harrington (Karen's father) and I objected to the state taking Karen's child support money, *I agreed to relinquish custody of Karen to her father.* She is, therefore, no longer on my AFDC grant. I signed a Consent Agreement, allowing him to suspend his support payments. [Emphasis added.]

"13. After I let Karen go live with her father, I reapplied for AFDC for Anthony, Roderick and Jermaine. My current grant amount is $215 per month. This is the grant for four persons—$244—reduced by $29 per month because Anthony is temporarily out of the home. I also receive $50 per month for Jermaine's support from James Richardson, which I am allowed to keep because of the '$50 disregard.'"

James Richardson, father of Jermaine, has filed an affidavit, which states:

"2. Since the time Jermaine was born, I have been involved in his care and support. I have provided clothing, food and diapers for Jermaine, and have paid some of the household bills for Jermaine's mother, Mary Medlin. I have occasionally brought gifts for some of Mary Medlin's other children.

"3. After Mary Medlin applied for AFDC for her other children, she told me that Jermaine would have to be included in the AFDC application. Because I was taking care of him, I did not think he should be on public assistance and objected to this. She

said that if Jermaine were not placed on AFDC, she would lose her AFDC for all her other children. Upon learning that, I reluctantly consented to having Jermaine placed on the AFDC grant.

"4. *Shortly after Jermaine was placed on the AFDC grant, I was contacted by Nancy Dickerson of the Child Support Enforcement Unit in Wake County. She requested that I sign a voluntary support agreement to pay approximately $165 per month. I asked if all the money would go to Jermaine she explained that if I paid that amount, only $50 would go to my child, and the rest would be kept by the state to pay for Ms. Medlin's AFDC grant. I told here that I did not think that was right because Jermaine had never been on AFDC and the state should not get Jermaine's support. Although I was, and am, interested and willing to support my son, I refused to sign the agreement unless the money would go to Jermaine.* [Emphasis added.]

"5. Soon after that meeting, a sheriff came to my job to serve me with a warrant for criminal non-support, case number, 85 CR 10961, Wake County. I was not there and had to pick up the warrant at the sheriff's office.

"6. I hired an attorney to assist me with this case because I did not believe I should have to pay support that would not be used for my own child. My attorney was unable to obtain the results I sought, which would have allowed my child to receive all my support. He advised me to sign a support agreement in the amount of $136 a month, which I reluctantly did."

3) Joyce Miles, 34, has five children, DeAngela Allen, age 17; Felicia Allen, age 14; Larry Miles, age 10; Johnetta Miles, age 6; and Kisha Miles, age 5. Ms. Miles does not have a full- or part-time job. She states:

"4. The father of my two younger children is John Brown. No legal paternity determination was ever made with regard to him and he has never been ordered to pay support. He has never supported these two children.

"5. The father of Larry Miles, Jr. is Larry Miles. He was originally ordered to pay support pursuant to Wake County 76 CR 64672. As of October 31, 1983 he was $4,803 in arrears. On July 18,1984, he signed a Voluntary Support Agreement and Order in Wake County, 84 CVD 4576 to pay $108 per month toward current support and $22 a month toward the arrearages.

"6. The father of the two oldest children is Arthur Allen. Pursuant to Wake County 83 CVD 3122, he regularly pays child support of $189 per month for his children.

"7. Prior to October, 1984, I was receiving AFDC in the amount of $244 per month for myself and my three younger children. The two older children were receiving $189 per month child support from their father.

"8. After October, 1984, the Wake County Department of Social Services required me to add my two older children to the AFDC application. I was informed that my entire grant would be terminated unless I reapplied and included all the children.

"9. Although I did not want to put my two older children on AFDC, because they are adequately supported, I did so because it was the only way I could receive any income for myself and the three younger children.

"10. When I added the two older children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS 1201 —attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"11. Because of this Assignment, my older children do not receive the $189 child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

"12. With myself and the three younger children on the AFDC grant, my payment was $244 a month. With all five children on the grant, my payment is $288 a month. (I am currently receiving only $278 per month because the Department of Social Services is collecting an overpayment.) I also receive a $50 monthly check, called the child support disregard.

"13. Because of the loss of most of the child support, I have been unable to provide for the two oldest girls as I was able to before. I have been unable to purchase such things as class rings, shoes and clothing."

4) Arvis Waters, age 29, has five children, Allen Waters, Jr., age 10; Andre Waters, age 8; Alise Waters,

age 7; Bernard Williams, Jr., age 2; and Aaron Williams, age 1. Ms. Waters attends North Carolina Central University full time and participates in a work-study program while taking care of her children, but she earns no income. Ms. Waters states:

"4. The father of my three oldest children is Allen Waters. He pays no support for his children. Because of his extremely violent behavior, I have been exempted from the requirement that I assist the Department of Social Services in obtaining support from him.

"5. The father of the two youngest children is Bernard Williams. He regularly pays child support of $45 per week for his children. He pays this support pursuant to an Order of the Family Court of the State of New York, County of Bronx, docket number P-78667/83, dated March 23, 1984.

"6. Due to my lack of income or child support for the three oldest children, I applied for AFDC benefits for myself and three oldest children in August, 1984. Before the application was completed however, I was informed by my eligibility worker at the Durham County Department of Social Services that my two youngest children must also be included in the AFDC application.

"7. Although I did not want to put my two youngest children on AFDC because they are adequately supported, I did so because it was the only way I could receive any income for myself or the three oldest children.

"8. When I added the two youngest children to the AFDC application, I was required to sign an Assignment of Rights to Support form (DSS 1201 —attached) on their behalf. This assigned their support to the North Carolina Department of Human Resources.

"9. Because of this Assignment, my youngest children do not receive the $45 weekly child support they are entitled to receive from their father. It is diverted by the Clerk of Court to the Department of Human Resources.

"10. With myself and the three oldest children on the AFDC grant, my payment would have been $244 a month. With all five children on the grant, my payment is $288 a month. Although I am entitled to receive a $50 monthly check, called the child support disregard, I have not been receiving this.

"11. I appealed the decision requiring me to add my two youngest children to the AFDC grant and sign an assignment of their child support at a State Administration hearing. On February 21,, 1985, I received a Notice of Decision which upheld the County Department's decision that I must include my youngest two children in the AFDC application and assign their support to the state.

"12. Due to only receiving a total of $288 per month for me and my five children to live on, I am not able to provide my children with many of the things I would like to. For example, I can never buy my children new clothes and even though I keep my children clean, they often aren't dressed

the way I would like or the way other children at day care are. Also, there is no money left after the necessary bills are paid and therefore I can never buy any toys or special things for them like other children in the neighborhood have. Next week is the birthday of one of my children and I cannot even afford a birthday present. If I got the support money for my two younger children I would be able to at least buy a few things for them other than absolute necessities and then they wouldn't feel so left out. Also, my youngest child needs a car seat and a high chair and I cannot afford to buy either."

By supplemental affidavit, Ms. Waters offered this information:

"1. Since the time the Standard Filing Unit went into effect, my family and I have been off and on AFDC several times. I am not currently receiving AFDC benefits but have reapplied.

"2. My understanding is that the father of my two youngest children regularly pays $45 a week into the Clerk of Court in Bronx, New York. This money is not transmitted to me or the Clerk of Court in Durham County, North Carolina on a regular basis. The Clerk in New York has informed me that the office there is too backlogged to send the money as it is paid in.

"3. I moved to North Carolina from New York in May, 1984. The last child support I received in New York was in April, 1984. I worked from May through August and did not receive and AFDC

benefits during that time. Because of the backlog in New York, however, I did not receive any of the child support paid for those months.

"4. When I returned to school in September, 1984, I began to receive AFDC benefits. I received AFDC from September through December 1984.

"5. In November, 1984, accumulated child support of $495 was sent to me. This caused my AFDC check to be terminated effective December 1, 1984, despite the fact that this amount represented child support during the months I worked and was not receiving AFDC. I had no income for December, January and a portion of February.

"6. I was permitted to reapply for AFDC in February, and was reinstated, at the rate of $288 a month, in March. I also received a pro rated check for part of February.

"7. I continued to receive $288 per month in AFDC benefits through July.

"8. In May, another accumulated child support check, for $585, was sent to me from New York. I reported this to the Department of Social Services and was informed that it would cause my AFDC to again be terminated. For reasons I do not understand, the AFDC check was not terminated, and I received $288 in AFDC through July.

"9. In August, my AFDC check was in the amount of $195. I was informed by my worker that my benefits were being reduced to recoup the benefits I received after receiving the May child support

check. I have not been informed how much the department intends to recoup.

"10. Also in August, I checked with the Durham Clerk of Court's office and learned that $810 in child support had been sent from New York in July. This money was sent to the North Carolina Department of Human Resources. I immediately went to talk with my worker at Durham D.S.S. to learn how that money would be distributed. My worker told me that if I returned the August AFDC check, I could receive all but $288 out of the $810 support check. The $288 would reimburse the state for the AFDC paid in July, the month the support was received.

"11. I returned my August AFDC check and voluntarily terminated my AFDC case, based on the information obtained from Durham D.S.S. At the end of August I received a check for $50, representing the disregard for the July support received.

"12. I returned to D.S.S. to try to learn why I had only received $50. At that time my worker said he had been mistaken and that all the remainder of the $810 in child support would be retained by the state. I tried to get my August check back, but that request was denied. I reapplied for AFDC, but have not yet been certified or received any money.

"13. *Other than the one $50 payment I received in August, I have not received any child support disregard checks.* [Emphasis added.]

"14. As a result of being without income, I have absolutely no money. I have run out of just about everything that cannot be purchased with Food Stamps, such as soap, toothpaste, toilet paper, etc. My rent has not been paid for September. When my son had an asthma attack, I did not have enough cash to pay a cab to get him to the health clinic. Both Aaron and Bernard are pigeon toed and need to wear hard shoes, but I cannot by [sic] them. None of the children have had any new clothes or shoes for several months. It is only through the kindness of a friend that I even have diapers for the baby. I am extremely frustrated and do not understand why my children cannot get the child support being paid for them."

5) Diane Jefferys, age 25, has four children, Latoya T. Jefferys, age 8; Anettress T. Jefferys, age 5; Shanta M. Jefferys, age 4; and Anthony T. Jefferys, age 2. Ms. Jefferys is unemployed and is without any independent source of income of any kind. She states:

"4. I am married to Michael Jefferys, although we have been separated for many years. He is the father of Latoya and Anthony. As a result of a court order in the Wake County case 79 CVD 2360, he is required to pay $51 a week in support.

"5. Johnny Michael Shannon is the father of Shanta and Anettress. No paternity determination has been made by a court regarding Mr. Shannon, nor has he been ordered to pay support.

"6. Prior to October, 1984, I received AFDC for myself and Anettress and Shanta in the amount of

$233 a month. I received child support from Michael Jefferys of $204 per month. The total was $427.

"7. After October, 1984, I was required to add Latoya and Arthony to the AFDC grant. Neither I nor the children's father wanted them added to the welfare unit, but I had no real choice because I had to have some income to support Shanta and Anettress.

"8. In November, 1984, my AFDC grant increased to $267 per month. I also received a $50 check each month as the child support disregard.

"9. I have not received a $50 disregard check since May, 1985. I later found out this was because Michael Jefferys stopped paying support. I don't know why he stopped paying support, but he has told me that he feels like when he pays, his children do not really benefit. He feels he is supporting all my kids when he pays support.

"10. My AFDC check is now my only income. It has gone up to $294 because of the ten percent increase that went into effect July 1, 1985.

"11. After my income dropped, I experienced extreme financial difficulties. I could barely afford the rent of $200 per month for my house on my income of $427 per month. After the new rule went into effect and my income went down I got behind on my rent and was evicted in June. I could not find a place to live that I could afford on my lower income. I had to move in with my cousin,

who already had a household of four. Due to her kindness my family has been able to stay there, but we really need a place of our own. I got behind on most of my other bills and have had a terrible struggle trying to keep the bunk beds I bought for my children. I cannot buy any clothes or shoes for the children, and have been getting used clothing from charitable organizations. I have had to miss several doctor's appointments because I have not had money to pay for transportation."

While plaintiffs' affidavits poignantly and effectively document the economic and personal consequences of the SFU regulations, it is also helpful to note the actual income reduction suffered by those movant children who are forcibly included in the AFDC unit and whose child support rights are then assigned to the state. A chart supplied by the movants illustrates the income lost by each child previously receiving child support:

Family	Pre SFU	Post SFU	Reduction
Sherrod Thomas	$200/mo	$ 74 + $50 = $124	38%
Aaron & Bernard Williams	$194/mo	$ 96 + $50 = $146	25%
Felecia & DeAngela Allen	$189/mo	$ 96 + $50 = $146	23%
Latoya & Anthony Jefferys	$204/mo	$106 + $50 = $156	24%
Karen Medlin	$200/mo	$ 53 + $50 = $103	48.5%

V. THE CONTROLLING FEDERAL STATUTES AND REGULATIONS NOW REQUIRE THE STATE TO INCLUDE A CHILD RECEIVING ADEQUATE CHILD SUPPORT IN HIS OR HER FAMILY'S AFDC FILING UNIT AND TO COUNT THAT CHILD'S INCOME AS FAMILY INCOME.

In 1971, this court invalidated the North Carolina policy of classifying child support in amounts exceeding the state determined need levels as a resource available to the family in which the child lived and thereby reducing the amount of AFDC benefits for that family. This decision reflected the conclusion that this policy violated the intent of the Social Security Act as then written. The court found that the Act obviously intended to provide assistance only to needy children. Classification of a child as needy was based on a comparison of the child's resources with the state need standard. By demanding that a child receiving child support in excess of the need standard had to be included in the AFDC unit, North Carolina officials disregarded congressional intent to include only needy children in such units. In addition, in 1971, this court found that the North Carolina practice ignored the limitations imposed by 42 U.S.C. § 602(a)(7), which authorized state officials, in making need determinations, to consider a child's resources in determining a child's needs, but did not authorize nor require that resources available to only one child living in an AFDC home should be treated as a resource available to the whole family. Since a child receiving child support had no apparent legal duty to support the other members of his or her family, the child's income could not be treated as a family financial resource.

Plaintiffs now assert that, despite the changes made in the Social Security statute by the Deficit Reduction Act

("DEFRA") amendments, the Standard Filing Unit ("SFU") regulations continue to contradict the purpose of that Act by (1) including ineligible children in the assistance unit and (2) presuming that child support payments made to one child in a family represent income available to the family as a whole.

In order to evaluate plaintiffs' statutory challenges to the SFU regulations, it is helpful to examine the legislative history and the language of the DEFRA amendment.

In May, 1983, Secretary of Health and Human Services, Margaret M. Heckler submitted a legislative proposal to Vice President George Bush as President of the Senate. Her proposal, aimed at minimizing state and federal AFDC expenditures and thereby reducing the federal deficit, contained a "group of related amendments to establish uniform rules on the family members who must file together for AFDC, and the situations in which income must be counted. In general, the parents, sisters and brothers living together with a dependent child must all be included; *the option of excluding a sibling with income, for example, would no longer be available.*" Page 1 Exhibit A to Federal Defendant's Motion to Dismiss And In the Alternative For Summary Judgment. [Emphasis added.] In a "Section-by-Section Summary" of the proposed amendments to the Social Security Act, Secretary Heckler described those amendments captioned "Parents and Siblings of Dependent Child Included in AFDC Family" as follows:

> "Section 102 of the draft bill would further amend the plan requirements contained in section 402(a) of

> the Social Security Act by adding a new requirement that the State include, as a member of the AFDC family (both the needs and the countable income of) the parents and the minor siblings of the dependent child for whom aid is claimed and who are living with the dependent child if the siblings are, themselves, deprived of parental support or care and under the age limit selected by the State.
>
> "The general inclusionary rule does not, however, include stepbrothers and stepsisters of the dependent child nor does it include, if the dependent child has attained age 16, the employable parent of the child. Once it has been determined that the parent or sibling must be included in the AFDC family unit, one consequence is, as would be made explicit within paragraph (37), that *any income of the parent or sibling must be considered as part of the family's income* for purposes of determining eligibility and benefit amount. notwithstanding section 205(j) of the Social Security Act, in the case of OASDI benefits. This amendment would become effective October 1, 1983." *Id.* at pp. 3-4. [Emphasis added.]

Although the Secretary's legislative proposal was not adopted by Congress when it was originally submitted in the 1983 legislative session, similar changes were enacted as part of the Deficit Reduction Act of 1984. The legislative history of the 1984 Act demonstrates that Congress accepted the core of the Secretary's proposal when they passed 42 U.S.C. § 602(a)(38).

The Senate Finance Committee's explanation of the pertinent DEFRA change reads as follows:

B. *Income Maintenance Provisions*
Aid to Families With Dependent Children (AFDC) Provisions

1. Parents and Siblings of Dependent Child Included in AFDC Family

(sec. 971 of the bill)

(Contained in S. 2062 as originally reported)

Present Law

There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child. In addition, a mother who is a minor is excluded if she is supported by her parents. However, if she has no income of her own which may be attributed to her child, the child may qualify for assistance as a one-person unit, and receive proportionately more in assistance than it would receive as part of a two-person unit. The income of the parents of the minor parent is not considered in determining the eligibility of the child.

Explanation of Provision

The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC. In addition, if a minor who is living in the same home as his or her parents applies for aid as the parent of a needy child, the income of the minor's parents

would be counted as available to the filing unit. The rules that would be used in determining the amount of available income would be the same as are currently used in counting the income of stepparents.

This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole. A similar provision was approved by the Committee last year, but was dropped in conference with the House.

S.Rep. No. 98-169, Senate Comm. on Finance, 98th Cong., 2d Sess., Deficit Reduction Act of 1984, Explana- of Provisions Approved by Committee on 3/21/84, 980 (Comm.Print 1984).

The Conference Report also indicates that, while the House initially made no change in the law, it later agreed to adopt the Senate amendment with one modification:

24. Parents and Siblings of Dependent Child Included in Filing Unit

Present law

There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. In addition, a mother who is a minor may be excluded if she is supported by her parents. However, if she has no income of her own which may be attributed to her child, the child may qualify for assistance as a one-person unit. The income of the minor parent's parents is not considered in determining the eligibility of the child.

House bill

No provision.

Senate amendment

Requires States to include in the filing unit the parents and all minor siblings living with a dependent child who applies for or receives AFDC. SSI recipients and stepbrothers and stepsisters are excluded from this requirement. In addition, if a minor who is living in the same home as his parents applies for aid as the parent of a needy child, the income of the minor's parents would be counted as available to the filing unit. The rules that would be used in determining the amount of available income would be the same as are currently used in counting the income of stepparents. Effective April 1, 1984.

Conference agreement

The conference agreement follows the Senate amendment with the following modification: amonthly [sic] disregard of $50 of child support received by a family is established. The disregard is applied at eligibility determination and benefit calculation.

The provision is effective October 1, 1984.

H.Conf.Rep. No. 98-861, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 697, 751-1401.

Despite the DEFRA changes, plaintiffs contend that the children receiving child support payments in excess of the individual need standard cannot properly be included in an AFDC filing unit. Plaintiffs point to the language of 42 U.S.C. § 606(a) which defines "dependent child," the intended AFDC beneficiary, as a "*needy* child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with [a relative] in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or

(B) at the option of the state, under the age of nineteen and a full-time student. . . . " [Emphasis added.]

Plaintiffs argue that the child support income of the affected children makes them ineligible for assistance because, by virtue of receiving such payments, they are not needy children. Their individual incomes exceed the prorated state need standard for persons living in an AFDC unit.

However, the legislative history clearly shows that the intent of the DEFRA amendment is to measure need by assessing the aggregated resources of all family members. The legislative history also makes clear that the option of choosing which members of a family may be included in the assistance unit is no longer available to families whose members have different individual sources of income. Consequently, the financial circumstances of an individual child are no longer determinative of that child's exemption from the AFDC unit but are now relevant to an appraisal of the eligibility of his or her mother and half sisters or brothers for AFDC benefits.

Plaintiffs further insist that a child receiving child support payments cannot meet the definitional requirements of § 606(a)(1). Such a child is not deprived of parental support. Defendants respond by offering a literal but credible interpretation of clause (a)(1) in light of DEFRA's legislative history. Defendants point out that deprivation is defined in terms of "support *or care*" [emphasis added] and argue that a child receiving support may still be considered deprived because he or she is not cared for by his or her absent father. The court finds that the defendants' literal interpretation reflects

the intent of the statutory modification accomplished by DEFRA.

Finally, plaintiffs state that "nothing is the statute or its Conference Report states that legally restricted child support payments should be counted dollar for dollar in making a determination of need for the dependent child. In fact, the statute never mentions child support, nor does the final Conference Report which accompanies it." Plaintiffs urge that § 602(a)(7)a only directs a state agency to "take into consideration" the income of dependent brothers and sisters when making a determination of need. Plaintiffs suggest that the constitutional implementation of this construction would be to consider income of other deprived siblings but exclude any money that was legally restricted for the use of only specified children. Plaintiffs find nothing in the legislative history to compel a different result. Instead, plaintiffs assert that a constitutional reading of the disputed statutory provisions will not permit counting income that is legally restricted for the use and benefit of only one child as family income. Plaintiffs believe that, when interpreted to avoid constitutional infirmities, the statute does not demand such attribution of income.

The court agrees that the constitutional approach to income evaluation would be to exclude legally restricted income. That would be the constitutional approach, but it was not the *congressional* approach.

The court has a duty, when possible, to construe a statute so as to avoid a constitutional question; nevertheless, to give this federal statute the reading plaintiffs suggest is to ignore its legislative history and to read

it to be pointless legislation. Unless Congress intended to count the child support resources as available to the family as a whole, little or no saving would be accomplished. In addition, despite plaintiffs' attempts to offer a limiting reading of the statutory language, the Senate Report and the Conference Report obviously contemplate the inclusion of child support income in an applicant family's budget.

The Conference Report in particular confirms the intended consequences of the statutory amendments. After discussing the previous law which had imposed no requirement that parents and all siblings be included in the AFDC filing unit and after noting that families had been able to exclude from the filing unit members whose income might reduce the family benefit, the Conference Report indicates that "the conference agreement follows the Senate version with one modification, the establishment of a $50 disregard of *child support* received by the family." [Emphasis added.] The Senate version, which required states to include in a filing unit the parents and all minor siblings living with a dependent child who applies for and receives AFDC, was designed to "*end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of families that live together and share expenses is recognized and counted as available to the family as a whole.*" S.Rep. No. 98-169, *supra*. [Emphasis added.]

This Senate amendment, adopted by Congress with one modification in conference committee, tracks the Secretary's original proposal so closely that the Secretary's

interpretation of the act's meaning through promulgation of regulations becomes important. One regulation, 45 C.F.R. § 233.20(a)(3)(ii)(D) (1985), offers particular assistance in clarifying the statutory meaning:

> (D) Income after application of disregards, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered. To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

The regulatory distinction between "actually" available and "legally" available income corroborates the defendants' contention that Congress intended the attribution of child support income to other family members as a means of reducing AFDC expenditures.

Thus, the only way Congress can have made the statutory presumption of availability effective is by pre- emping that portion of state child support laws that makes the child support money the exclusive property of the child in whose name the child support order was issued or whose name the money was voluntarily delivered, regardless of the mother's handling or distribution of the funds. Otherwise, the child's money would be unavailable under state law and the statutory presumption would be only a figment of the congressional imagination. In *Heckler v. Turner*, — U.S. —, 105 S.Ct. 1138, 84 L.Ed.2d 138 (1985), the Supreme Court has recently explained that the principle of actual availability of resources and income has, for AFDC purposes, "served primarily to prevent the States

from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by over valuing assets in a manner that attributes non-existent resources to recipients." The same limitation should presumably be applied to federal action regarding the attribution of income unless conflicting state law has been overridden by federal enactment. Plaintiffs reply that despite the explanation provided by the legislative history, Congress did not accomplish a pre-exemption of state law that satisfies judicially defined requirements.

Here plaintiffs' statutory and constitutional arguments converge. If the pre-emption of certain elements of state child support laws has been accomplished, what are the constitutional ramifications of such a selective pre-emption? Can a child previously entitled, under state law and often state order, to receive a specific amount of monthly child support for his or her exclusive use and benefit be deprived of the protective restrictions on the use of his or her money by virtue of his or her membership in a particular type of family unit, a unit composed of children with child support income and children whose only source of support must be AFDC because their fathers are unable or unwilling to support them? Alternatively, if the attempted pre-emption has not been executed correctly, can the state confiscate child support pursuant to the state and federal regulatory guidelines, thereby depriving a targeted set of children of the still extant and otherwise enforceable protections of state law again because the child lives in a family with a particular configuration of members?

Those questions will now be addressed more fully.

VI. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE 1984 DEFRA AMENDMENT DEMONSTRATE CONGRESSIONAL INTENT TO PREEMPT STATE LAW RESTRICTIONS ON THE USE OF CHILD SUPPORT THAT WOULD PREVENT THE STATE FROM TREATING ONE CHILD'S SUPPORT INCOME AS FAMILY INCOME.

North Carolina law obligates parents to support their offspring. N.C.G.S. § 50-13.4(b) requires that "the father and mother shall be primarily liable for the support of a minor child. . . ." N.C.G.S. § 50-13.4(c) further prescribes that "[p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of *the* child for health, safety, and maintenance. . . ." N.C.G.S. § 50-13.4(d) adds that child support payments for a minor child must be paid "to the person having custody, any proper agency, or to the court for the benefit *of such child*" [Emphasis added.]

North Carolina courts have interpreted the state's child support laws to require that child support money be spent only on the child for whom the support has been obtained. In *Goodyear v. Goodyear,* 257 N.C. 374, 379, 126 S.E.2d 113 (1962), the North Carolina Supreme Court wrote:

> "While defendant [father] was and is obligated to make the monthly payments called for in his contract for the support of his children, plaintiff [mother] is not the beneficiary of the moneys which defendant must pay. These moneys belong to the children. Plaintiff is a mere trustee for them. That part of the payments not reasonably necessary for support and maintenance, she must hold for the benefit of the children and account to them when they call upon her.

> She cannot, by contract with another person, profit at the expense of the children."

Similarly, *Tyndall v. Tyndall,* 270 N.C. 106, 153 S.E.2d 819 (1967), recognized that a cause of action for the benefit of the children would exist if the custodial parent used the money for support of the children for any other purpose.

The statutes' own terms and their subsequent interpretation by North Carolina's highest court reveal the legal restrictions on the use and attribution of child support income. The affidavit of Judge Patricia S. Hunt, District Court Judge in North Carolina Judicial District 15B, explains how these restrictions work in practice:

> "6. Under North Carolina statutory and case law, a District Court Judge is required to order the payment of child support based solely on the needs of the child and the needs and ability of the noncustodial parent to contribute to the support of the child.
>
> "7. When setting the amount a non-custodial parent is required to pay for the support of a child, a District Court Judge *is not permitted to consider the needs of other children who may live in the household, who are not the children of the noncustodial parent.* [Emphasis added.]
>
> "8. Under North Carolina Law, a District Court Judge cannot order a man to pay child support unless there has been a determination of his paternity of the child and therefore, a conclusion that he has a legal responsibility for support.
>
> "9. When ordering the payment of child support, a District Court Judge specifically names the parent who is to pay the support and the child for whom the support is designated. *It is a violation of a court order for a custodial parent to spend the*

child support on other children not designated in the child support order. [Emphasis added.]

"10. Under North Carolina law, parents have a legal obligation to support their children. If a custodial parent refuses to provide for the needs of his child, the child may be removed from his custody by court order and placed in the custody of the Department of Social Services."

Hunt Affidavit, p. 2.

Unless state law has been pre-empted, when North Carolina compels an AFDC mother to count child support income of only one child as a family financial resource, it requires her to violate the child support laws in order to obtain AFDC funds to support her other children.

A. Plaintiffs Have Standing To Challenge Whether Congress Has Pre-Empted State Domestic Relations Law.

[4, 5] The court does not agree with defendants' allegation that movants lack standing to raise what defendants refer to as "the Tenth Amendment issue." Plaintiffs can draw on the Tenth Amendment as support for their argument that state law, especially state family law, deserves special recognition and respect. Tenth Amendment precepts bolster plaintiffs' argument that the Supremacy Clause should be carefully and sparingly applied *in the domestic relations context.* Plaintiffs, however, rely on Supremacy Clause cases which themselves demonstrate that individuals can raise Supremacy Clause questions without facing any standing obstacles. Although the Supremacy Clause and the Tenth Amendment (both structural constitutional norms) directly regulate rela-

tions between governments rather than the relations between governments and individuals, nevertheless, individuals should have standing to assert constitutional protections derived from them. *Cf. Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In *Chadha,* an individual facing deportation had standing to challenge a legislatively mandated procedure that violated the constitutional principle of bicameralism, another structural norm, as long as the individual had suffered an injury in fact and could demonstrate that the judicial relief requested would prevent or redress the claimed injury.

B. State Domestic Relations Laws Are Not Pre-Empted Unless Pre-Emption Is Positively Required By A Direct Federal Enactment.

The United States Supreme Court has repeatedly recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-4, 10 S.Ct. 850, 853, 34 L.Ed. 500 (1890); *Wetmore v. Markoe,* 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904); *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). When state family law appears to conflict with a federal statute, the Supreme Court has limited its review under the Supremacy Clause to a determination whether Congress has "positively required" the pre-emption of state law "by direct enactment." *Wetmore v. Markoe, supra,* 196 U.S. at 77, 25 S.Ct. at 176. If that has been done, state family law provisions will be overridden only if they do "major damage" to "a 'clear and substantial' federal interest." *Hisquierdo v. Hisquierdo,* 439 U.S. at 581, 99

S.Ct. at 808, *with references to United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966). State laws have been struck down only when rights and expectations established under federal law are threatened by the continued operation of state law or when the enforcement of state law would frustrate or undermine the necessarily uniform implementation of Congressional policy.

The Fourth Circuit recently applied these pre-emption rules in *Caswell v. Lang,* 757 F.2d 608 (4th Cir.1985). In *Caswell,* the court scrutinized an apparent conflict between the federal bankruptcy code, 11 U.S.C. § 1301 *et seq.*, and Virginia's child support laws. A Virginia father attempted to restructure his child support arrearages by including them in a Chapter 12 restructuring plan. The mother asserted that the bankruptcy court lacked the authority under the federal code to modify child support obligations established under state law and by state court order. The Fourth Circuit found that the bankruptcy statute gave "no suggestion that Congress specifically intended . . . to include past due child support obligations in a Chapter 13 reorganization plan. . . ." Therefore, it found no "clearly conflicting federal enactments" requiring the pre-emption of state law. 757 F.2d at 610 n. 3.

Applying *Hisquierdo* and *Caswell,* movants argue that 42 U.S.C. § 602(a)(38), the DEFRA language at issue here, fails to demonstrate congressional intent to override state child support laws. Thus, plaintiffs propose that 42 U.S.C. § 602(a)(38) fails to meet the *Hisquierdo* "positively required by direct enactment" standard. This court cannot agree.

C. The Language And Legislative History Of DEFRA Demonstrate That Congress Did Intend To Pre-Empt State Law.

Congressional pre-emptive intent can be found most easily when the statutory terms address and resolve the conflict with state law. *See, e.g., Hisquierdo, supra,* 439 U.S. at 576, 99 S.Ct. at 805 (Railroad Retirement Act, 45 U.S.C. § 231m, stated: "Notwithstanding any other law of . . . any State . . ., no annunity . . . shall be assignable or be subject to . . . attachment, or other legal process under any circumstances whatsoever. . . ." However, pre-emption has been recognized in contexts where congressional intent must be drawn from the language, structure and history of a statute or set of statutes. As *McCarty v. McCarty,* 453 U.S. 210, 220-21, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981), explained, "*Hisquierdo* did not hold that only the particular statutory terms there considered would justify a finding of pre-emption; rather, it held that '[t]he pertinent questions are whether the [state law] rights asserted conflict with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require non-recognition'" (quoting *Hisquierdo, supra,* 439 U.S. at 583, 99 S.Ct. at 809). As *McCarty* demonstrated, the meaning of statutory terms can often be confidently discerned only after an examination of the legislative history and the relevant federal program's history of operation. Review of subsequent implementing federal regulations also often clarifies legislative meaning and demonstrates congressional pre-emptive intent. *See, e.g., Ridgway v. Ridgway,* 454 U.S. 46, 53, 102 S.Ct. 49, 54, 70 L.Ed.2d 39 (1981).

Invoking the *Hisquierdo/Yasell* principle that state family law can only be overridden if it threatens to do "major damage" to "a clear and substantial federal interest," plaintiffs also question whether the DEFRA amendment's objective (budgetary saving) represents such a federal interest and whether the continued enforcement of state child support laws would actually inflict "major damage" on efforts to reduce federal expenditures.

Though the exact magnitude of the anticipated saving is not known, the reduction of family benefits would be significant and, in this period of mounting public concern about the eventual economic consequences of increasingly large federal deficits, neither the saving nor the statutory objective can be characterized as insubstantial.

The court therefore finds that Congress has preempted state child support laws in so far as those laws restrain the use and distribution of child support income received by a child who lives in a home in which the mother and her other children rely on AFDC in order to live.

After exploring the DEFRA amendment's legislative history and implementing regulations, the court is confident that Congress contemplated the conflict between its objectives and state law and chose to prempt those protective restrictions that would prevent the treatment of one child's child support income as a family financial resource.

It is possible that this court's reading of *Hisquierdo* and its progeny may not show sufficient deference to state law. Perhaps when the state law affected governs as important an aspect of domestic relations as the en-

forcement of the parental duty to support minor children, a reviewing court should demand greater precision in the actual legislative text before recognizing a congressional intention to pre-empt state law. *Cf. McCarty v. CcCarty, supra,* 453 U.S. at 237, 246, 101 S.Ct. at 2748 (Rehnquist, J., dissenting) (After reciting the "positively required by direct enactment" test from *Wetmore* and *Hisquierdo,* Justice Rehnquist argued that "[t]he most the Court can advance are vague implications from tangentially related enactments or Congress'*failure* to act. The test established in *Hisquierdo* established that this was not enough." Justice Rehnquist, joined by Justices Stewart and Brennan, insisted that "pre-emption by negative implication" was insufficient under *Hisquierdo.)* With that possibility in mind, the court will analyze the constitutional deficiencies posed by the federal statute and state and federal regulations from alternative premises: first, that a pre-emption of state law has been accomplished and, second, that it has not.

VII. THE FEDERALLY SANCTIONED STATE REQUIREMENT THAT MOTHERS SEEKING AFDC FOR THEIR UNSUPPORTED CHILDREN MUST ASSIGN TO THE STATE THE CHILD SUPPORT RIGHTS OF AN ADEQUATELY SUPPORTED CHILD UNCONSTITUTIONALLY DEPRIVES THE SUPPORTED CHILD OF PROPERTY. WHEN THE STATE COOPERATES WITH A FEDERAL PLAN TO COMPEL A MOTHER TO SURRENDER ONE CHILD'S INCOME SO THAT THE REMAINING CHILDREN CAN SURVIVE ON AFDC, THE STATE TAKES PROPERTY FROM THE CHILD'S TRUSTEE AND IMPOSES AN UNCONSTITUTIONAL TAX ON THE SUPPORTED CHILD'S MEMBERSHIP IN A PAR-

TICULAR TYPE OF FAMILY UNIT. THE STATE THUS BECOMES THE FEDERAL GOVERNMENT'S PARTNER IN A TAKING.

A. The Child Receiving Adequate Child Support Suffers A Loss Of Property As A Result Of The Enforcement Of The SFU Regulations.

Defendants emphasize that families choose to participate in the AFDC program and contend that such voluntary action eliminates the possibility of a taking or other constitutionally cognizable injury. The child receiving child support can and does make no choice regarding participation. The minor child automatically becomes a member of the AFDC unit if his or her mother and half-siblings apply for assistance. As a minor, the child's financial affairs are handled by the mother/caretaker. The falsity of the freedom of the mother, whose options are to reduce one child's child support income or cut her other children off from their sole source of support, AFDC, is painfully clear.

Defendants propose that mothers in mixed income families have the option of continuing to spend an amount equivalent to the full child support amount on the child entitled to child support even after he or she becomes a part of the AFDC unit. The child's income level could, according to defendants, be maintained in this way even while the SFU regulations are in operation. That "option" is illusory. If a mother did spend such a disproportionate share of her AFDC grant on one child, she would surely violate 42 U.S.C. § 605, which requires a mother/caretaker to use the grant money in the best interest of *all* the children in the unit or face administrative review of her conduct, possibly subjecting herself to civil or criminal penalties.

State defendants suggest that their regulations do no more than "*authorize* . . . sharing" between children (emphasis added). What defendants really do is *require* the sacrifice of income a child has no duty to provide to his or her family. The child entitled to child support has no legal duty to support his or her mother and half-siblings. This is demonstrated by the fact that, even under the SFU regulations, if such a child moved out of the mother's household and lived with the father, neither the child nor the father would have to continue to contribute to the support of the mother and her other children. State defendants also argue that the child receiving child support experiences no loss of income as a result of the assignment of rights and the child's forcible inclusion in the AFDC unit. The child's income, according to defendants, only "passes through" the state to the child! Since only fifty dollars flows back to the child alone, it is difficult to accept defendants' proposition that no loss of income has occurred. If the child deposited $200 in a bank, for example, and was told, upon attempting a withdrawal, that only fifty dollars was unconditionally retrievable, it would be hard to convince either the child or an observer that nothing had been lost. Defendants propose that the child derives certain value-equivalent, albeit unasked for, benefits from the assignment system that, in effect, compensate the child up to the level of the original support amount. For example, the defendants assert that the now poorer child is "happier" for having "shared" his or her income with the mother and needy half-siblings. It may well be that one child wished to help another, but that possibility is no justification for the government to take what the child has not offered.

Another hypothetical form of compensation suggested by defendants is the enhanced security the state provides by policing the absent father's delivery of support and pursuing him upon failure to make full payment. Defendants' service, of course, no longer principally benefits the child but primarily works to the advantage of the state and federal treasuries. In addition, it is far from clear that a rational person in the position of the child entitled to child support would pay such a substantial portion of his or her income for the questionable security now offered, *arguendo,* by counsel.

Defendants' system has already discouraged some absent fathers from continuing to honor their support obligations. *See* Thomas Supplemental affidavit, ¶¶ 1-7 (describing John Pennington's refusal to support his son Sherrod when the total amount would no longer go to Sherrod); Jefferys Affidavit, ¶ 9 (recounting Michael Jefferys' discontinuation of support payments in reaction against the SFU system); Medlin Affidavit ¶ 12 (describing Bobby Harrington's objection to the assignment of daughter Karen's income and Ms. Medlin's decision to send Karen back to her father rather than jeopardize or diminish the child's income). These negative paternal reactions present a risk of non-collection ignored by the defendants. The cost of pursuing deliberately delinquent fathers will not be insignificant. Also, those fathers who voluntarily provide regular support payments but whose paternity has not been legally established will prove particularly difficult and costly targets for collection. District Court Judge Hunt has stated:

> 13. If a father refuses to pay support, I have very few legal tools to utilize to force him to pay child support.

a. I can threaten a father with a jail term, or actually order him to jail, but a father does not pay child support while he is in jail, so that a jail term rarely results in income for the family.

b. I have the power to garnish wages, but I have found that fathers who fail to accept their responsibility and do not want to pay support change jobs frequently in order to avoid court orders. Another problem with the garnishment of wages is that in North Carolina, especially in rural counties, the employers who do not want to bother with the paperwork of garnishment will fire their employees or will pay them under the table in order to avoid the garnishment order. Although I tell fathers they have a legal remedy if the employer fires them, the reality is that the employers find another excuse to fire the employee.

Hunt Affidavit, ¶ 13.

In light of these facts, the compensatory value of state collection security appears minimal at best and far less than the monetary loss experienced by the supported child.

B. By Pre-Empting State Law Restrictions On The Use And Distribution Of Child Support Paid By A Father For The Benefit Of His Child, DEFRA Becomes The Instrument Of A Taking.

Regardless of the "relative importance to the state of its own law," "when there is a conflict with a valid federal law," the federal law must prevail. *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962); *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 210-211, 6 L.Ed. 23 (1824). Assuming that Congress has communicated its goal of pre-empting state child support law with the requisite clarity, the constitutional validity of the federal enactment is doubtful. The DEFRA amendment and the state and federal regulations under it dilute the pro-

tection state law offers to certain children receiving child support. The selective pre-emption of state law represents an unconstitutional taking that deprives the children of their entitlement to child support simply because they live with a needy mother and half-siblings.

The child receiving child support has access to this income only through his or her caretaker, who acts as a trustee administering the child's money. However, as explained by the previously discussed North Carolina Supreme Court decisions, until the passage of DEFRA, the money belonged *only* to the child. Even if Congress has pre-empted the legislatively created and judicially imposed obligation of the caretaker/mother to use a child's income only for that child, the child retains the *right* to receive child support, even to receive the *same amount* of child support as was prescribed by an original child support order, which was formulated on the assumption that the total amount was necessary to meet the child's basic needs. However, under the DEFRA/SFU plan, the child has lost the previously existing guarantee that the caretaker will act as a trustee, using the child support received only for that child's benefit. Thus, although the *right* to the specified amount of child support has not been extinguished, the right has clearly taken on a new, shrunken form.

C. A Taking Can Occur When Regulation Reshapes A Property Right.

In considering whether a taking has occurred in cases involving government regulation, a court traditionally looks to the economic impact of the regulation, the regulation's interference with investment backed expectations, and the character of the challenged government action.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Intangible interests comparable to the right to receive and use a court-ordered amount of child support have been recognized as property for the purposes of takings analysis. *See, e.g., Ruckleshaus v. Monsanto,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (trade secrets; health, safety, and environmental data); *Armstrong v. United States,* 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) (materialman's lien); *Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (valid contracts).

As a result of the DEFRA/SFU regulations, a child previously entitled to child support has lost the right to enforce the fiduciary obligation that prohibited the mother from spending the money on anyone other than the designated child. The right to exclude others is generally "one of the most essential sticks in the bundle of rights commonly characterized as property." *Kaiser Aetna v. United States,* 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979). Although the child receiving child support income remains entitled to the full child support amount, as evidenced by the state's acquired right to institute legal action against a father who does not pay the whole amount, the child can only maintain *unrestricted access* to the money if the child lives in a household separate from his or her mother and half-brothers and sisters. This condition on access significantly dimminishes the value of the child's enforceable right. *Cf. Moore v. City of East Cleveland,* 431 U.S. 494, 520, 97 S.Ct. 1932, 1946, 52 L.Ed.2d 531 (1977) (Stevens, J., concurring) (analyzing single family occupancy zoning ordinance that applied restrictive definition of family as a taking in which unjustified restrictions

were imposed on the affected property-owner's right to use her property as she saw fit).

When a regulation goes too far in reducing the values incidental to property, a taking has occurred. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). From the perspective of the child receiving child support, that is what has happened here. Borrowing from the language of *Armstrong v. United States,* 364 U.S. at 48, 80 S.Ct. at 1568, "[b]efore the [child support rights] were destroyed, the [children] had compensable property. Immediately afterwards, they had [substantially less]. This was not because their property vanished into thin air. It was because the government for its own advantage destroyed the value of [their rights]."

Although, for example, the child's father must continue to pay the full court-ordered amount or face prosecution by the state, the child will now receive uniqualified use of only fifty dollars from that amount. Thus, the child experiences a significant adverse economic impact as a result of the SFU regulations if his or her half-brothers or sisters need to receive AFDC. From the absent father's point of view, a corollary harm occurs. Under the SFU regulations, his investment in the child's well-being and development, his child support payment, is diverted away from his child to the state through the forced attribution of that money to the child's mother and half-siblings. Thus, what once was the child's becomes the state's under the unvalidated assumption that the money belongs to the family as a whole.

A sovereign "by *ipse dixit,* may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith,*

449 U.S. 155, 164, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980). This is particularly true when only a segment of a particular set of right-holders are selected to bear such a loss. The Takings Clause "guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people to bear public burdens which in all fairness should be borne by the public as a whole." *Armstrong, supra,* 364 U.S. at 49, 80 S.Ct. at 1569.

Under the DEFRA/SFU regulations, of all the children receiving child support in North Carolina, only those who live with needy half-siblings are required to contribute a significant portion of their income to the state in the name of their needy half-siblings in order to reduce state and federal AFDC expenditures. Thus, not only are the affected children deprived of certain valuable "sticks," such as exclusive use of their money, from their child support property "bundle," *Kaiser Aetna, supra,* they are so deprived *on the basis of the composition of their family,* a constitutionally impermissible basis, and to the detriment of a fundamental constitutional interest, the right to maintain existing family relationships.

D. Even If Congress Has Failed To Pre-Empt Those Elements Of State Law That Would Deny The State Access To The Child Support Income Of An Adequately Supported Child Living With His Or Her AFDC Dependent Family, The State Has Forced Mothers To Surrender The Child's Property To The State In Violation Of The State's Own Laws.

If Congress has *failed* to pre-empt state law, the legal protections of the child's income under state law still

exist, but *they are simply not enforced on behalf of the plaintiff class of children.* If the mothers need to obtain AFDC for the other children in the family, the children entitled to child support see the bulk of their income (anything over the first $50) taken by the state under the forced assignment system, after the money has been funneled through their half-siblings by means of the "availability" fiction. The state, wearing the cloak of federal authorization, effects an unconstitutional taking by using one set of children's needs as a lever to coerce a mother either to break her legal obligation to the child receiving child support or to see her other children go hungry without AFDC.

From the perspective of the child receiving child support, the failure of the state to enforce its own laws restricting the use of his or her income, and the state's taking of the money from his or her mother under duress represent a deprivation of property in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The child loses the use of the child support money solely because the child resides with his or her mother and needy half brothers and sisters.

From the mother's perspective, the SFU regulations require her to break one existing law to honor another. The irrationality of imposing such contradictory obligations illustrates how these regulations fail to comport with Due Process. The fact that only women who strive to maintain households composed of both children with child support income and children with no source of income other than AFDC face such an irrational choice exposes the simultaneous substantive Due Process and Equal Protection failings of the regulations.

VIII. A DEPRIVATION OF PROPERTY THAT SIMULTANEOUSLY INFLICTS DAMAGE ON A FUNDAMENTAL INTEREST, FAMILY AUTONOMY, TRIGGERS SPECIAL JUDICIAL SCRUTINY OF GOVERNMENT ACTION CAUSING SUCH INJURIES.

A government does not have unlimited power to redefine property rights, *Loretto v. Teleprompter Manhatton CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), and whatever power government does have cannot be exercised in a way that penalizes people, especially children, on the basis of their family status. To take property from such persons on that basis violates constitutional principles of Due Process and Equal Protection.

Examined from that perspective, the harm inflicted in this case begins to bear an alarming resemblance to the harm redressed in *Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). In *Moore,* a city ordinance limited occupancy of a dwelling unit to members of a single family, but defined "family" so that a grandmother living with two grandsons who were first cousins, not brothers, did not qualify. Under the ordinance, it became a crime for the grandmother to live with the two boys. Striking down the ordinance as unconstitutional, the Court wrote:

> "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974). A host of cases, tracing their lineage to *Meyer v. Nebraska,*

> 262 U.S. 390, 399-401 [43 S.Ct. 625, 626-27, 67 L.Ed. 1042] (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510 534-535 [45 S.Ct. 571, 573, 69 L.Ed. 1070] (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166 [64 S.Ct. 438, 442, 88 L.Ed. 645] (1944). *See, e.g., Roe v. Wade,* 410 U.S. 113, 152-153 [93 S.Ct. 705, 726, 35 L.Ed.2d 147] (1973); *Wisconsin v. Yoder,* 406 U.S. 205, 231-233 [92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15] (1972); *Stanley v. Illinois,* 405 U.S. 645, 651 [92 S.Ct. 1208, 1212, 31 L.Ed.2d 551] (1972); *Ginsberg v. New York,* 390 U.S. 629, 639 [88 S.Ct. 1274, 1280, 20 L.Ed.2d 195] (1968); *Griswold v. Connecticut,* 381 U.S. [85 S.Ct. 1678, 14 L.Ed.2d 510] (1965) . . . . [additional citations omitted]. Of course, the family is not beyond regulation. *See Prince v. Massachusetts, supra,* [321 U.S.] at 166 [64 S.Ct. at 442]. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the government interests advanced and the extent to which they are served by the challenged regulation."

431 U.S. at 499, 97 S.Ct. at 1935.

The *Moore* court held that the constitutional right to live together as a family did not belong to only the nuclear family—a couple and their dependent children. *Id.* at 502, 97 S.Ct. at 1937. With that in mind, the *Moore* majority invalidated the challenged ordinance on substantive due process grounds, finding that the ordinance sought to standardize families and children, "forcing all to live in certain narrowly defined family patterns." *Id.* at 506, 97 S.Ct. at 1939. The SFU policy has the same effect, especially for families like Mary Medlin's, in which a child, like Karen, is sent away from her home with her mother and half-siblings, back to her father so the child

can receive her full amount of child support without simultaneously rendering the mother's other children ineligible for AFDC.

Defendants are mistaken in their contention that their actions deserve only minimal scrutiny. Defendant's invocation of the minimal rationality standard applied in cases such as *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), *Schweiker v. Hogan,* 457 U.S. 569, 102 S.Ct. 2597, 73 L.Ed.2d 227 (1982), and *Califano v. Aznavorian,* 439 U.S. 170, 99 S.Ct. 471, 58 L.Ed.2d 435 (1978), suggests the use of a standard inappropriate for this case. Defendants find these cases controlling only by misconstruing the focus of the inquiry. The cases cited by defendants deal only with a governmental decision to withhold a non-contractual welfare benefit. This case, however, addresses a governmental decision to intercept the delivery of *private* property, the full child support amount ordinarily available *from the father* (not the state) to the affected child. The impact of this action on the child's fundamental associational rights and on a property right requires a more rigorous examination than defendants suggest and than their behavior can withstand.

Finally, defendants attempt to meet the plaintiffs' serious questions about the burdens the SFU system imposes on family life by arguing that government can influence important choices, even choices regarding the exercise of a fundamental right, through the use of economic disincentives. *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), relied on by defendants, proceeded upon the assumption that though the unavailability of

Medicaid funding might influence a poor woman's decision to have an abortion, it did not absolutely preclude her from doing so. A poor woman had no absolute right to such Medicaid coverage. Even though she did have a right to have an abortion, she did not have a right to a *state subsidized* abortion. Here, however, a child entitled to child support must sacrifice one right to exercise another. If the child wants to live with his or her family, consisting of a mother and half-siblings, the child must surrender a right to private property, the right to derive exclusive use and benefit from money awarded to the child by state court order or voluntarily provided by an absent father. The cases cited by defendant do not control.

A. Whether Accomplished By Means Of Federal Pre-Emption Or Otherwise, The Expropriation Of the Supported Child's Property In Order To Reduce Governmental Expenditures Punishes The Child For Exercising The Child's Fundamental Right To Live With His Or Her Family.

An otherwise valid government objective, deficit reduction, cannot be accomplished by means of the discriminatory imposition of burdens. *See, e.g., Metropolitan Life Insurance Company v. Ward,* — U.S. —, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985). By requiring AFDC applicants to count the child support income of selected children as a family resource, the federal and state governments impose a thinly disguised tax on the child because of membership in a particular type of family. To impose this type of invasive tax on children due to family circumstances beyond their control is constitutionally intolerable. *Cf. Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (Texas statute denying public edu-

cation to illegal alien children violated the Equal Protection Clause of the Fourteenth Amendment. The statute irrationally imposed a lifetime hardship on a discrete class of children not responsible for their undocumented status.)

The Supreme Court has already acknowledged:

> ". . . [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.' "

Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973), *with reference to Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) *(Gomez* found that a Texas law denying the right to parental support to illegitimate children while giving it to legitimate children violated the Equal Protection Clause). The concerted action of the federal and state governments here is equally "illogical and unjust." A child has no control over the composition of the family into which he or she is born. Therefore, the nature of the child's family cannot be the basis for the legislated deprivation of essential support.

B. The Supported Children Should Not Be Penalized For Their Mother's Alleged Past Breaches Of A Fiduciary Duty.

Both state and federal defendants contend that the DEFRA program causes no harm to the affected children because it simply recognizes and institutionalizes the ac-

tual financial practices of mothers in households composed of children receiving child support and children dependent on AFDC. They say that the child entitled to child support experiences no actual diminution of income, because mothers in mixed income families had been spending the child support money for other children's needs even before the regulations went into effect. They say their regulations now only reflect current family financial practices, and do not cause any alteration of family life.

This argument may suffer from reliance on unsubstantiated and inaccurate assumptions about maternal conduct before the SFU regulations went into effect. The testimony of plaintiff Dianne Thomas is a firsthand account of real life before the SFU regulations went into effect: ". . . I used the money for *both of them,* sure did. If he needed something and his check was late I would use Crystal's [child support] money *and it was vice versa.*" Thomas Deposition, p. 35 [emphasis added]. Ms. Thomas used money, a fungible commodity, fungibly. She drew from whatever resource was available at the time a need arose. This does not necessarily mean, when the family accounting (if any) was done, that, dollar for dollar, the child entitled to a full child support amount actually received any less than that amount by the end of a given month in the pre-SFU period.

More importantly, this argument by the defendants ignores the fact that the mothers, who, in moments of financial crisis, spent child support money on other children, violated their fiduciary duty to spend the money only on the specified child. The fact that some mothers may have

redistributed income within a family fails to erase the legal obligation *not* to do so *and does not reduce the amount of child support owed the children.*

To dilute the rights of children to support, because some mothers, under financial stress, fail to carry out their legal duty to use the money solely for particular children, penalizes the children for parental misconduct in a manner condemned by the Supreme Court in *Plyler, supra,* 457 U.S. at 220, 102 S.Ct. at 2396:

> "Their 'parents have the ability to conform their conduct to societal norms,' . . . but the children . . . 'can affect neither their parents' conduct nor their own status.' *Trimble v. Gordon,* 430 U.S. 762, 770 [97 S.Ct. 1459, 1465, 52 L.Ed.2d 31] (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental concepts of justice. '[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to *the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.* Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.' *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 [92 S.Ct. 1400, 1406-07, 31 L.Ed.2d 768] (1972) (footnote omitted)." [Emphasis added.]

This is why the procedural due process approach of several other courts who have addressed this controversy in other states fails to redress the constitutional wrong done. *See Gorrie v. Heckler,* 624 F.Supp. 85 (D.Minn. 1985); *Johnson v. Cohen,* No. 84-6277, slip opinion (E.D.Pa. October 3, 1985). Requiring (as some courts have done) a

pre-termination or pre-reduction hearing to determine whether a mother who is applying for AFDC has in the past spent one child's support money on her other children ignores the immateriality of that determination to any adjudication of the child's rights.

C. The DEFRA Scheme Endangers Family Integrity And Undermines The Well-Being Of Family Members.

Regardless of whether pre-emption has occurred, the DEFRA plan and the SFU regulations inflict needless additional burdens on already vulnerable families and threaten to disrupt already strained family relationships.

The implementation of the regulations can cause the dislocation of the child receiving child support and the disintegration of the family unit to which the child belonged. *See* Medlin Affidavit, ¶ 12. (Plaintiff Mary Medlin sent her daughter Karen to live with Karen's father, Bobby Harrington, to preserve the child's income.) Although membership in the intimate community of a particular family may not be chosen by the child, it can, nonetheless, be cherished by the child. The Supreme Court has recognized that the "importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derrive from the intimacy of daily association" in a family's home. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977).

Mothers are also adversely affected. Pressure of the new regulations on low income mothers can be a source of anxiety. The state suddenly extinguishes or ignores the mothers' duty to deliver child support payments to

the child to whom the money is given. A mother must then choose whether to continue to abide by that duty or to deny her unsupported children, whose well-being is also her responsibility, their sole source of subsistence. After complying with the SFU regulations, the mothers see their family income reduced from its already meager levels and must watch *all* their children suffer as a result. *See* Arvis Waters Affidavit, ¶ 12 (AFDC income was so low mother was unable even to purchase a small birthday gift for child); Diane Jeffreys Affidavit ¶ 11 (reduction of income compelled mother to move in with her cousin's family and to rely on family members and charitable organizations for help in meeting her family's basic needs). Mothers have also been threatened with physical violence by fathers who angrily reject the idea that the children they are supporting are being placed on welfare. *See* Diane Thomas Affidavit, ¶ 18.

These government created conditions undoubtedly test these mothers' capacity to cope with the already daunting task of keeping their families intact. If a father decides to stop supporting his child as a result of the SFU regulations, or if he refuses to see the child now on AFDC despite the father's best efforts to provide support, the child and his or her mother may well also lose access to the father's kin network, which can offer broken low-income families a valuable source of support in times of crisis. *See* Declaration of Duke University professor and anthropologist Carol Stock, ¶ 9. When a mother and child are cut off from that source of aid:

> "[T]he mother is placed under great emotional and physical stress, and the child, in consequence, whose development is already at risk, is placed in an even

more vulnerable position. . . . A study of child abuse by Michael Wald, Professor of Law at the Stanford University Law School, demonstrates that mothers and children are more vulnerable when there is a lapse in the viability of the family network. When mutual aid is provided by the kin network, children are less at risk; when the mother becomes unable to rely on the network, that is when the incidence of child abuse, neglect and other problems increases." *Id.* at ¶ 15.

D. The DEFRA/SFU Plan Contradicts Existing Incentives For Fathers To Recognize And Honor Their Duty To Support Their Children.

The evidence shows that the SFU objective, the attribution to the whole family of money paid by an absent father for his child alone, and the inclusion of the father's child in an AFDC unit, frustrate and anger fathers who have met their legal and moral obligations to support their offspring. Fathers justifiably proud of being able to keep their children off welfare by paying regular support now see that accomplishment erased. Such a father is powerless to keep his child out of the welfare system as long as the child lives with the mother and needy half-brothers and sisters. (A child often lives with the mother because she has been awarded legal custody by a state court or because the father is unable or unwilling to allow the child to live with him.)

The fathers' perceived loss of control over their children's fates causes some fathers to refuse to continue to provide support. Fathers who rebel against the system by withholding support that will no longer go to their children face criminal prosecution for non-support. *See* Affidavit of James Richardson, father of Ms. Medlin's

son Jermaine, ¶ 5. Other fathers react by withdrawing from their children's lives, sending a monthly support payment but never seeing the child. For instance, Sherrod Thomas' father, John Pennington, began to withhold support for Sherrod when he learned the money was being assigned to the state so Ms. Thomas and her daughter Crystal could qualify for AFDC. Mr. Pennington eventually resumed his payment of support but no longer visits his son, whom he had previously seen regularly. Mr. Pennington has told Ms. Thomas that he stopped seeing his son because the child is on AFDC. Upset and puzzled by his father's behavior, Sherrod has begun to display inappropriate behavior at home and at school. *See* Diane Thomas Affidavit, ¶ 11, and Diane Thomas Supplemental Affidavit, ¶¶ 1-7.

The fathers' reactions validly demonstrate not only how the SFU system weakens family relationships but also how the SFU regulations undermine other measures enacted to reinforce an absent father's sense that he has a duty to support his child. *See, e.g.*, 42 U.S.C. § 651 (Supp. II 1984) (providing federal support for state efforts to improve collection of child support); *McClelland v. Massinga*, 786 F.2d 1205 (4th Cir. 1986) (upholding against due process challenge Maryland State Tax Refund Intercept Program, which authorizes the State Comptroller to withhold the tax refunds of fathers delinquent in paying their child support).

Historically, public policymakers have seen the enforcement of child support obligations as essential to keeping children off welfare. *See Hisquierdo, supra*, 439 U.S. at 576, 99 S.Ct. at 805 ("Concerned about [Railroad Retirement] recipients who were evading support obligations

and thereby throwing children and divorced spouses on the public dole, Congress amended the Social Security Act by adding a new provision, § 459, to the effect that, notwithstanding any contrary law, federal benefits may be reached to satisfy a legal obligation for child support or alimony . . . 42 U.S.C. § 659" [footnote omitted]). *See also* 1984 U.S.Code Cong. and Admin.News 2397, 2402, Sen.Rep No. 98-387 (Examining the legislative history of federal child support enforcement initiatives, the Senate Finance Committee found that its 1974 proposal to create a new child support enforcement program had been explained as follows: "The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but, *more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.*" [Emphasis added.]).

Here the angry fathers do not abandon their children to welfare; they see children they are supporting conscripted into the welfare system. Drawing on her studies of low income families in general and of low income black families in particular, Duke University Professor Stack describes the fathers' experiences:

> "12. When it is possible for a father, married or single, to provide enough child support to keep his child off the welfare rolls, this act of responsibility and integrity brings status to the father, especially in

communities in which a future of chronic unemployment is a real risk for many children. This is not to imply that being on welfare necessarily entails a stigmatized status, for it is a necessity for the majority of black mothers. Rather, there are incentives within the structure of black communities, as well as in the public sector, that encourages fathers to keep their children off the welfare rolls. A father gains great self esteem and status in low income communities if he can give his child the chance for a life of gainful employment rather than welfare dependency.

"13. In communities whose families live in poverty, fathers who are able to support their children are considered to have a depth of character and integrity that defies unfair myths and stereotypes about fathers in general, and black fathers in particular. A law that tells fathers that their efforts cannot keep their children off the welfare rolls, or that what they can provide is not good enough, challenges the efforts and integrity of good men and fathers. Feelings of anger, frustration and shame are not inappropriate or unexpected. The anger is sometimes vented at children, sometimes at mothers, more often both."

Stack Declaration, ¶ 12 and ¶ 13.

In performing her child support enforcement duties, North Carolina District Judge Hunt has also learned much about the incentives and disincentives to which the fathers respond:

"11. . . . One of my greatest tools for instilling . . . responsibility has been a lecture to the parents about the importance of supporting a child and thereby removing that child from the public assistance rolls. I usually give the parents thirty (30) days to go out to find a job. I have observed the pride of accomplishment with which fathers have responded when they return to court to announce that they have obtained

employment and their child will no longer be on 'welfare'.

"12. Conversely, I have also observed the outrage a father has expressed when I have had to explain to him that even though he is providing support for his child, his child must be placed on the AFDC rolls so that the other children in the household can get AFDC. One father exploded in the courtroom yelling 'I won't have my child on welfare! I support him. And I'm not going to support anyone else's children!' I fully expect to continue hearing fathers' refusals to pay child support when they learn that their child support is being paid to the Department of Human Resources instead of to their children, and when they discover that their child is on welfare even though they are paying support regularly.

* * *

"15. As a result of the standard filing unit regulations, I can no longer encourage fathers to take responsibility for their children by talking to them about the importance of removing their children from the welfare rolls. They can no longer free their children from welfare unless they can pay enough money to support the entire family. Most of these fathers are making minimum wage, and they will never be able or willing, to pay child support for children not their legal responsibility and thus they cannot even rescue their own child. Many of these fathers grew up on welfare and they are very sensitive to the invasion of privacy the household experiences when the social workers come into their homes and to the lack of a father involved in their lives. They know and understand the pride the child feels when he or she can say 'my daddy supports me.' These fathers know firsthand that the children will grow up knowing that they are on welfare and that their mothers depend for support on a check each month from the Department of Human Resources and that food stamps buy the

groceries. It isn't the same as financial and emotional support from your own father.

"16. It is my experience that responsible people obey laws because they have something to lose—their money, their reputation, their freedom, or their pride. A substantial portion of our population has no money or reputation. When we take away their pride they have nothing to lose but 30 days in jail and there the whole scenario begins again."

Hunt Affidavit, ¶ 11, 12, 15, 16.

The documented effect of the SFU regulations on previously cooperative fathers' willingness to pay child support not only demonstrates how the regulations interfere in family life but calls into question the extent to which the DEFRA/SFU plan will actually achieve its goal, turning the pockets of selected fathers into a new source of government revenue. As *Moore v. City of East Cleveland, supra,* admonished, when government regulation penetrates the private realm of family life, as it certainly has here, such government intervention will only be tolerated when government can demonstrate that an important government interest is advanced by the regulation and that the mechanism chosen to advance the interest actually serves that end. 431 U.S. at 499, 97 S.Ct. at 1935.

E. By Forcing The Realignment Of Parental Duties, The Federal And State Governmental Actions Weaken The Underpinnings Of Family Life.

The required SFU regulations give the state significant leverage over the affected families and obviously influence crucial decisions about how, where and by whom children will be raised. Our Constitution protects the "liberty of parents and guardians to direct the upbringing and

education of children under their control." *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). *See also Wisconsin v. Yoder,* 406 U.S. 205, 232-233, 92 S.Ct. 1526, 1542, 32 L.Ed.2d 15 (1972).

Significantly, here, the state's motive for intervening in the "private realm of family life," recognized in *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), is *not to improve the lot of any member* at the expense of the liberty of others. Rather, here the government enters and influences family relationships in the name of state budgetary savings, to the financial and probable emotional detriment of all family members. Such interference ironically occurs in a program, AFDC, which operates under the following "authorization of appropriations":

> "For the purpose of *encouraging the care of dependent children in their own homes or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living *to help maintain and strengthen family life* and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children."

42 U.S.C. § 601 [emphasis added].

Using the plaintiffs' experiences as references, the children receiving child support experienced reductions in income of between 23% and 48.5% when they were included in the AFDC unit. The AFDC income available to meet the needs of the mother and her other children is also reduced, and the absent father experiences a reduction of the value of what could be called his child support investment. He is no longer assured that, for example, his $200 payment will help his child survive or thrive. Now only a fraction of his money will go to *his* child and the remainder will become the father's contribution, ostensibly to his child's half-brothers and sisters to whom he owes no duty of support, but actually to the state and federal treasuries.

These facts illustrate how the DEFRA/FSU regulations represent the nationwide resurrection of the practice forbidden by *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). There, the Supreme Court invalidated Alabama's "substitute father" regulation, which denied AFDC payments to children whose mother cohabited in or outside her home with an able-bodied man. An example of the attribution of non-existent resources to a family applying for AFDC, the regulation required the denial of benefits without any inquiry into whether the man was the children's father and had an obligation to support the children or did, in fact, do so. The Supreme Court struck down the regulation as inconsistent with federal statutory intent to provide aid to children deprived of the support or care of a parent who was legally obligated to support them. What once was a state aberration has now become national law. Under DEFRA's presumption of availability, an absent father paying child support to his child becomes the

de facto provider for all children living with his child's mother.

Traditional notions of responsibility are radically revised by the DEFRA/FSU system. Fathers who are financially able to support their child and who recognize their obligation to do so are irrationally penalized and undoubtedly confused when their monetary contribution to the child's upbringing is commandeered by the state. Mothers in the affected families are similarly bewildered when the state effectively asks them to choose between the equally compelling rights and expectations of their children. Such mothers justifiably question why one set of children in the family must suffer for the others to survive. Were the children receiving child support able to represent their own interests and raise their own voices in protest against the SFU system, they too would wonder why one child in a family must suddenly be involuntarily thrust into the role of provider for the other members of the family.

F. Though The Reduction Of Governmental Deficits Is An Important Objective Worthy Of Legislative Attention, The Constitution Should Not Permit Family Duties To Be Destroyed So That Federal Dollars Can Be Saved.

A long line of legal authority supports the proposition that government can interject itself in family life and alter members' most intimate arrangements only when armed with a compelling justification and an appropriately tailored instrument of intervention. *See, e.g., Moore v. City of East Cleveland,* 431 U.S. 494, 74 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

Families, poor and rich alike, are our nation's foundation, an irreplaceable resource which cannot be traded away to reduce the national debt. Children are a similarly invaluable national asset. Ironically here, lawmakers' and voters' concern about escalating deficits has intensified as a result of the perception that these deficits threaten to rob future generations of economic security. Legislators' desire to avoid the prospective economic harms to generations of children, some not yet born, does not erase the present property and associational rights of the children in the families affected by the SFU regulations. The Constitution's consistent recognition and protection of family associational rights prevent the state and federal governments from using children's unchosen membership in a family that includes AFDC dependent half-sisters and brothers as the justification for the deprivation of property. For the injured children and their relatives, the price of reducing federal deficits should not be the legislated sacrifice of property rights or family life.

IX. THE RELIEF THAT IS DUE

Plaintiffs are entitled to full relief.

Both state and federal defendants should be enjoined from further enforcement of DEFRA/FSU income attribution regulations. State agencies should no longer require an AFDC applicant with a child who receives child support income to assign that child's child support rights to the state in order to obtain AFDC for the applicant's remaining children. The federal government should no longer require state officials to do so. State defendants should be ordered to pay retroactive AFDC benefits to all

families in North Carolina whose benefits were denied, reduced or terminated as a result of the enforcement of the SFU regulations. State defendants are entitled to appropriate relief in their cross-action against federal defendants.

Retroactive benefits are properly available in this case. Unlike *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), where, at the time a constitutional violation was found, state officials were under no court imposed obligation to conform to a different standard, the state here was still acting under the restrictins imposed by this court's earlier injunction, which forbade the involuntary attribution of child support income to a family in which some children received adequate child support income and some received only AFDC. That injunction still binds the state defendants as it has not been stayed, vacated or reversed. *Pasadena City Board of Education, supra.* The state defendants did not seek relief from the provisions of the original injunction by formal motion until after plaintiffs filed for further relief, nine months after the SFU regulations had been put into operation in contravention of this court's earlier injunction.

Although the legislative and federal regulatory background changed due to the passage of the DEFRA amendments and the promulgation of the implementing regulations, the state was not thereby absolved of its duty to seek relief from the outstanding injunction before acting in direct violation of it. State defendants were aware of the conflict between the anticipated SFU regulations and this court's outstanding order. On August 22, 1984, the North

Carolina Division of Social Services, Planning and Information Section, issued a memorandum that stated:

> The effect of this law in *Guilliard* [sic] will depend on whether or not the new law supercedes the court order. If it does, *Guilliard* would be voided. If not, the State would be placed in much the same position as exists in *Alexander v. Hill,* i.e., either comply with a court order and lose compliance with Federal regs, or vice versa. If the State chose the court order in such a situation, the state would be responsible for AFDC payments to such cases.

Despite its own cognizance of perceived conflicting obligations, not completely unlike those to which the movant mothers are subjected under the SFU regulations, the state chose to defy the operative injunction and did not return to court for a ruling on the apparent conflict.

When the state defendants began to deny AFDC applications and to reduce or terminate benefits under the SFU regulations, they were still obligated under court order to provide such benefits, regardless of whether or not a caretaker/applicant had assigned the child support rights of selected children to the state. As cogently explained in *Daubert v. Percy,* 713 F.2d 328, 329-330 (7th Cir.1983):

> "Not every award of retroactive monetary relief payable from a state treasury violates the Eleventh Amendment. Had the Secretary chosen to defy the 1973 injunction instead of moving for relief from it, the district court could have held him in contempt and ordered him to pay from the state treasury benefits that had already accrued. *Hutto v. Finney,* 437 U.S. 678 [98 S.Ct. 2565, 57 L.Ed.2d 522] [1978] . . . Ordering a state to pay benefits that it had been required to pay . . . is no more disruptive of its budget process than is asking it to pay a civil contempt fine. . . . "

X. CONCLUSION

Plaintiffs are entitled to relief as above indicated, and to costs and attorney fees. They will tender appropriate orders and serve them on all other counsel.

State defendants are entitled to appropriate relief in their cross-action against federal defendants. They will tender appropriate orders and serve them on all other counsel.

IN THE DISTRICT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated,

Plaintiffs,

—vs—

PHILIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY McCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants and
Third-Party Plaintiffs,

—vs—

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services,

Third-Party Defendant.

ORDER

(Filed July 3, 1986)

The federal third-party defendant has filed a motion for clarification of this court's memorandum of decision in this case. The motion seeks a clarification of the treatment of child support payments in the AFDC program and of the court's holding on the constitutionality of the federal statute. The motion is GRANTED.

As the third-party defendant noted in its motion, this court has confronted the constitutional question posed by the federal statute, 42 U.S.C. § 602(a)(38), part of the 1984 Deficit Reduction Act. The court finds the statute unconstitutional because it imposes a financial penalty on children receiving adequate child support while living in families composed of their mothers and their AFDC dependent half-brothers and half-sisters. Such a deprivation of property based on a child's unchosen family membership violates due process and equal protection principles, as explained at length in the memorandum of decision. The state regulations can no longer be implemented because they carry out the constitutionally offensive prescription of the federal statute.

In regard to the treatment of child support under the AFDC program, the court acknowledged that when a child receiving child support is *voluntarily* included in an AFDC grant application, the child's income is taken into consideration in calculating need and fixing the amount of assistance. AFDC recipients are required to assign the child's child support rights to the state as a condition of receiving AFDC. *See* 42 U.S.C. § 602(a)(26). This court does not address and has not been asked to address the propriety of counting a *voluntarily* included child's support income as a family financial resource for purposes of calculating the grant.

What plaintiff-movants asked this court to consider was the loss of income experienced by children in families in which adequately supported children have been *required* to become part of the AFDC filing unit so that their mothers and unsupported or inadequately supported half-siblings can remain eligible for AFDC benefits under 42

U.S.C. § 602(a)(38). The third-party defendant correctly notes that "the change which DEFRA wrought" is "to mandate the inclusion of all co-resident parents and siblings, including child support recipients, in any filing unit." FEDERAL THIRD-PARTY DEFENDANT'S MEMORANDUM OF LAW IN SUPORT OF MOTION FOR CLARIFICATION OF MEMORANDUM OF DECISION, p. 4. It is the economic deprivation such inclusion precipitates that is the constitutionally cognizable injury suffered by the involuntarily included children who were previously receiving adequate child support. Once in the unit, such a previously excluded child no longer receives the full amount of child support paid by his or her father. The child receives only the child support "disregard" and a fraction of the family's AFDC grant. This combined amount represents a significant loss of income for the adequately supported child. The unsupported child who is totally dependent on AFDC also loses income because he or she will now have access to a smaller portion of the AFDC grant.

The court is puzzled by the third-party defendant's inability to comprehend the economic consequences of the SFU regulations. The court's understanding of how the DEFRA inspired SFU system works draws on the affidavits of the plaintiff/movants, such as the Miles affidavit, reprinted, in pertinent part, at pp. 15-16 of the memorandum of decision. The Miles affidavit is described by the third-party defendants as "the most accurate example of the implementation of DEFRA." Federal third-party defendant's MEMORANDUM OF LAW, *supra*, p. 5.

Ms. Joyce Miles has five children. Her two youngest children, Johnetta and Kisha, receive no support from

their father. Her middle child, Larry Miles, Jr., is entitled, under a voluntary support agreement and order signed by his father, Larry Miles, on July 18, 1984, to receive $108 a month in support and $22 a month toward Mr. Miles' accrued support arrearage, which stood at $4,803.00 as of October 31, 1983. While Larry Miles, Jr., was entitled to such support, Ms. Miles does not report in her affidavit that such money was ever received after the support agreement was filed. Ms. Miles did not report receiving a $50.00 disregard for Larry, Jr., when he was receiving AFDC as part of the original four-person unit. This gives reason to doubt that Larry, Jr.'s father actually abided by the support agreement and may explain Ms. Miles' decision to include Larry, Jr., in the original filing unit. Ms. Miles voluntarily included the three youngest children in her AFDC filing unit and assigned Larry, Jr.'s child support rights to the state. Ms. Miles then received $244 a month in benefits for the four-person filing unit. At the same time, Ms. Miles' two oldest children, DeAngela and Felicia, received $189 a month in child support from their father. In October, 1984, the Wake County Department of Social Services informed Ms. Miles that she would have to add DeAngela and Felicia to the filing unit and assign their child support rights to the state *if she wanted her other three children to remain on AFDC.* Ms. Miles reluctantly agreed to add the two adequately supported children to the AFDC unit and assigned the girls' child support rights to the state. Ms. Miles then received no money from the girls' father, his support payments going directly to the state. Her monthly AFDC grant was raised to $288 a month for her family of six. Ms. Miles also received the $50 monthly child support disregard for the two oldest girls.

Before the SFU regulations went into effect, Ms. Miles had $244 a month to meet her needs and the needs of the three youngst children. She also had $189 a month to meet the needs of her oldest daughters. After October, 1984, Ms. Miles had only $288 a month in AFDC benefits for the whole family plus the $50 disregard for the two oldest girls. Before the SFU/DEFRA plan went into effect, DeAngela and Felicia shared $189, giving each a monthly income of $94.50. After October, 1984, these children obviously received less income. Plaintiffs/movants credibly hypothesized that the mother would divide the AFDC money equally among the family members, which would give DeAngela and Felicia a combined income of $146, or $48 each in AFDC plus the $50 disregard.

Contrary to the third-party defendant's misinterpretation of the court's discussion of the economic consequences of the SFU/DEFRA requirements in the memorandum of decision, the children's income reduction was not attributed to any simple subtraction of the amount of child support from the AFDC grant amount for the statutorily enlarged unit. Rather, the court recognized that the involuntarily assigned child support was considered family income and that amount was then compared to the need standard for a unit of the mandatorily expanded size in order to determine the unit's eligibility for assistance. If the amount of child support which some but not all of the children in the newly defined unit received was below the need standard for a family with the greater number of members, the family was eligible and the supported children would have to assign their child support rights to the state. These children would then receive the $50 disregard and a fraction of the grant. Every child in the

unit, those previously on AFDC and those previously supported by their fathers, would then experience a reduction in the amount of income to which they would have access.

The Court hopes the preceding explanations illuminate those portions of its previous memorandum of decision that the federal third-party defendants found unclear.

IT IS SO ORDERED, this 30 day of June, 1986.

/s/ James B. McMillan
United States District Judge

APPENDIX B

Beaty Mae GILLIARD et al., Plaintiffs,

v.

Clifton M. CRAIG, individually and as North Carolina Commissioner of Social Services, et al., Defendants.

Civ. A. No. 2660.

United States District Court, W. D. North Carolina, Charlotte Division.

Heard Nov. 5, 1970.

Decided June 10, 1971.

Action by AFDC recipients challenging state and local administrative authorities which had reduced total family payments because of support payments to one child thereof. A three-judge District Court, McMillan, J., held that both under rational interpretation of federal statute and North Carolina's own regulation it was improper to include as family resources child support payments of $43.33 a month paid by the father of one of the mother's seven children and thereby reduce the total AFDC payments to family by that amount.

Order accordingly.

Woodrow Wilson Jones, Chief District Judge, filed a dissenting opinion.

Gail F. Barber and Thomas W. Pulliam, Jr., Legal Aid Society of Mecklenburg County, Charlotte, N.C., for plaintiffs.

James O. Cobb, Ruff, Perry, Bond, Cobb & Wade, Charlotte, N. C., and L. P. Covington, Staff Atty., Raleigh, N. C., for defendants.

MEMORANDUM OF DECISION AND ORDER

Before CRAVEN, Circuit Judge, JONES, Chief District Judge and McMILLAN, District Judge.

McMILLAN, District Judge:

PRELIMINARY STATEMENT

This case was heard in Charlotte on November 5, 1970, before a three-judge court. The plaintiffs, individually and for the class of themselves and others similarly situated, seek declaratory and injunctive relief from policies and actions of the defendants which reduce benefits available to plaintiffs under the Social Security Act, Title 42, U.S.C., Section 601, et seq., and which policies and actions plaintiffs say violate the Social Security Act and the equal protection clause and the due process clause of the Fourteenth Amendment.

THE CLASS

Plaintiffs sue individually and as members of a class of persons who have been or may be subject to reduction of AFDC (Aid to Families with Dependent Children) benefits based upon unconstitutional or illegal claim of credit by administering agencies for outside income and other resources available to some but not all of a family group. The action is properly maintainable as a class action.

THE FACTS

The plaintiffs are Beaty Mae Gilliard; her seven children including Samuel Davis, Jr.; and Samuel Odell Davis. Samuel Odell Davis is the father of Samuel Davis, Jr., the youngest child, born in November, 1969, but is not

the father of any of the other children. On April 6, 1970, Samuel Davis, Jr. was legitimatized in a proceeding conducted under North Carolina General Statutes, Section 49-10, with the result that his father became legally obligated to provide for his support.

Before Samuel Davis, Jr., was born, Beaty Mae Gilliard and her other six children were receiving financial benefits under the AFDC program, which was established by subchapter 4 of the Social Security Act of 1935, as amended, 42 U.S.C., Section 601, et seq. This program is jointly funded by federal, state and local governments. It is administered statewide in North Carolina by the North Carolina Board of Social Services and the North Carolina Commissioner of Social Services and is administered in Mecklenburg County by the Mecklenburg County Department of Social Services.

Before the birth of Samuel Davis, Jr., the amount of benefits the Gilliards were receiving under the AFDC program was about $217 per month. After Samuel Davis, Jr. was born, he was added to the family group of beneficiaries, and the family's allowance was increased from about $217 a month to about $227 a month.

However, Samuel Davis, Sr. began making regular payments of $43.33 per month ($10 per week) to support Samuel Davis, Jr., and when the defendants learned this, they reduced the monthly AFDC payments by $43.33, effective in March, 1970, and since that time the AFDC payments have been only $184 a month instead of the former $227.

Appeal to the State Commissioner produced an affirmance of the decision to reduce the Gilliards' benefits.

This exhausts state administrative remedies. Exhaustion of state judicial remedies is not required. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); 68 Columbia Law Review, 1201 (1968).

Defendants say that the payments by Samuel Davis, Sr. are a resource available to the family and that the full amount of such payments should be deducted from benefits otherwise payable. Plaintiffs contend that the payments to young Davis are available to him alone; that they are his property, not his mother's and not the property of the family at large; and that the action of the defendants in charging the entire $43.33 against the AFDC allowance is discriminatory against all plaintiffs, both under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution, and as a matter of proper interpretation of the federal statutes and the state regulations.

THE STATUTES AND REGULATIONS

The federal statute which regulates the distribution of benefits is 42 U.S.C., Section 602(a)(7), which reads:

> "A State plan for aid and services to needy families with children must * * * (7) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any *child* or relative *claiming aid* to families with dependent children, or of any *other individual (living in the same home* as such child and relative) whose needs the State determines should be considered in determining the need *of the child* or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; * * *." (Emphasis added.)

The statewide regulations on which the defendants based their ruling are Section 301 of the North Carolina Public Assistance Manual, which says that

> "In AFDC, the budget is to include all *eligible* children in the home * * *" (Emphasis added)

and Section 320 of the Manual, providing that

> "* * * all income and any other resources immediately and regularly *available* must be taken into consideration." (Emphasis added.)

A portion of a regulation similar in principle is subsection I(B) (8) of Section 2321 of the North Carolina Department of Social Services Welfare Program Manual:

> "*Support Payments*—In AFDC cases where the parent who has deserted or abandoned the family and has been located, or where the parent is separated from the family, the monthly amount that the court orders him/her to pay is to be entered in the budget as a resource.
>
> "a. If the payments are not made in accordance with the court order, the amount must be eliminated from the budget as a resource or reduced to the amount actually being contributed by the parent."

In a case (Long v. Commissioner, Case No. 8053) arising in Forsyth County, North Carolina, the Commissioner ruled on October 30, 1970, ostensibly upon the authority of subsection I(B) (8) of Section 2321, that the amount of the support payments received by "one of [the] children" of an AFDC family pursuant to a court order was properly deducted by the County Department from the family's AFDC grant.

Apparently overlooked by the defendants in the Forsyth County case and in the case at bar was the main or

parent paragraph of subsection I(B) of Section 2321 of the Manual, which since July 1, 1969, has provided in pertinent part, as a statewide regulation, that:

> "* * * all cash income regularly available *to the family* must be considered in determining resources. This includes but is not limited to: amounts received from OASDI (verified), V.A., Workmen's Compensation, etc., dividends earned from savings, stocks, bonds, insurance policies, and other investments; cash regularly contributed *to the family;* and net cash derived from wages; net income from rental of rooms or real estate; net farm income; or net income from other sources * * *." (Emphasis added.)

The natural implication of the emphasized phrase is that for income or contributions to be counted as available in determining resources they should be available *to the family* and not just to one of its members.

At the time the defendants made their ruling in the Gilliard case in March of 1970, there was apparently no federal regulation which expressly controls this situation. However, on the 25th day of September, 1970, in a nationwide directive (Exhibit P) to affected state agencies, the Department of Health, Education and Welfare ruled that in the future, if one child of a group receiving AFDC payments should become also entitled to other *federal* aid under the Old Age Survivors and Disability Insurance (OASDI) provisions of the Act, the additional payment to or for the child should be counted as a resource *available only to that child.* This federal ruling does not decide the issue presented on the particular facts of this case, but it does embrace the principle contended for by the plaintiffs—the principle that assets belonging to one potential

member of the group of beneficiaries may not be treated as assets available to the entire group.

JURISDICTION

The complaint alleges a cause of action cognizable under 42 U.S.C., Section 1983[1] and within the jurisdiction of a district court under 28 U.S.C., Section 1343.[2] Since the complaint also seeks injunction restraining state officials and agencies from enforcing or carrying out statewide statutes and regulations upon grounds of unconstitutionality of the statutes and regulations, the case was heard by a three-judge court under 28 U.S.C., Section 2281.[3]

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1. 42 U.S.C., Section 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. 28 U.S.C., Section 1343(3), (4): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

3. 28 U.S.C., Section 2281: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The defendants contend, however, citing Stinson v. Finch, 317 F.Supp. 581 (N.J. Court, N.D.Ga., 1970), that because 42 U.S.C., Section 602(a) (7) requires agencies administering state AFDC plans to take into consideration "other income and resources of any child" in the home, in determining the need "of the child," the actions of the defendants are under color of federal rather than state law; that no cause of action is stated under Section 1983; and that this court does not have jurisdiction under Section 1343.

We are unable to agree with this contention. To begin with, as a matter of statutory interpretation, it is highly doubtful that Section 602(a) (7) requires or even contemplates that the independent resources of one child should be made available to the rest of the household; if Section 602(a) (7) provides a "color" of federal law, its hue is not the one visualized by defendants. In the second place, participation by the state in AFDC is not required but voluntary; implementation is left to the states; the authority of the defendants is under state statutes (see North Carolina General Statutes, Sections 108-1 to 108-19); and the discrimination under attack is based directly on statewide state regulations. We think there is adequate color of statewide law and regulation to satisfy Sections 1983 and 1343.

The defendants say further that the court does not have jurisdiction over the subject matter because the suit does not challenge the deprivation of a "civil right" of "personal liberty" but only the deprivation of a property right. They rely on Justice Stone's opinion in Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939),

in which Justice Stone said (at 307 U.S. 531-532, 59 S.Ct. 971):

> "* * * [W]henever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under [the Civil Rights Act] * * *."

The defendants also rely on McCall v. Shapiro, 416 F.2d 246 (2nd Cir., 1969), and Eisen v. Eastman, 421 F.2d 560 (2nd Cir., 1969).

We do not believe that this case is controlled by *Hague, McCall* and *Eisen.* In four cases decided after *Hague* [King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); and Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)] the Supreme Court has found jurisdiction on jurisdictional facts not materially different from the facts before this court. Although the Supreme Court did not in those cases expressly consider the "property right" language of Justice Stone, it can not be assumed that these decisions were entered in ignorance or unintended disregard of Hague v. C.I.O.

Moreover, some recent decisions have recognized a reasonable interpretation of Justice Stone's opinion which would support jurisdiction in welfare cases where plaintiffs allege deprivation of benefits vital to their subsistence. In *Eisen,* for example, Circuit Judge Friendly observed that King v. Smith, although it disregards Justice Stone's comment in *Hague,* arguably falls within

Hague because the defendants in *Eisen* had infringed upon Mrs. Smith's off-springs' "* * * 'liberty' to grow up with financial aid for their subsistence * * *" (421 F.2d 560 at 564); and in Taylor v. New York City Transit Authority, 309 F.Supp. 785, at 789 (E.D. N.Y., 1970), affirmed 433 F.2d 665 (2nd Cir., 1970). Judge Weinstein, in applying Justice Stone's formulation to the context of an employment discharge case, said:

> "Certainly it cannot seriously be contended that a man's liberty is not diminished when he is denied the option of remaining in a government job vital to his own and his family's sustenance. Life is a predicate for the exercise of the freedom to speak protected in *Hague.*"

See also, Lynch v. Household Finance Corporation, 318 F.Supp. 1111 (D.Conn., 1970); Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir., 1970); Roberts v. Harder, 320 F.Supp. 1313 (D.Conn., 1970); Campagnuolo v. Harder, 319 F.Supp. 414 (D.Conn., 1970); Russo v. Shapiro, 309 F.Supp. 385 (D. Conn., 1969); Johnson v. Harder, 438 F.2d 7 (2nd Cir., 1971).

It takes little imagination to see that the maximum amount of each monthly AFDC payment is vital to the subsistence of Mrs. Gilliard and her children. If Judge Friendly's as-yet dimly described principle states a constitutional right, it obviously applies to eight people living in the 1970's inflation on $227 a month.

Therefore, either under King v. Smith and other recent decisions of the Supreme Court, or under the theory that in this nation children have a right to subsistence and that infringement upon that right is a deprivation of personal liberty, we conclude that a cause of action is

properly alleged under Section 1983 and that there is jurisdiction under section 1343.

Since this court's jurisdiction to decide the substantial constitutional issues presented in this case is properly invoked, we think it appropriate on the basis of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), and Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), to exercise pendent jurisdiction over any non-constitutional issues of interpretation of statutes or regulations which the action may present. These issues are also appropriately before the three-judge court. Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960), 67 Columbia Law Review 84, at 108-109.

THE MERITS OF THE CASE

Having fought through the procedural and jurisdictional questions, and a lengthy set of Social Security and Welfare regulations, we find the ultimate merits of the case to be relatively uncomplicated. They are viewed by us as follows:

(a) *All plaintiffs are threatened by the defendants' action.*—Mrs. Gilliard's gross funds available to support six children are reduced by $43 a month. Her problems of existence, already difficult, become more complicated. She faces the Hobson's choice of applying Davis's contribution to benefit only Samuel Davis, Jr., or of improperly using some or all of Davis's contribution for the benefit of herself and the other children. The original six children, already on a "bare minimum" program, must

either exist on less, or become beneficiaries of the contribution of Samuel Davis, Sr., which he and his son have the right to expect will go to support only Samuel Davis, Jr. The daily necessity for such decision puts a moral and legal burden on Mrs. Gilliard to add to her obvious economic burden; the creation of such a burden is an unfair discrimination.

(b) *Inclusion of Samuel Davis, Jr. in the "class" against the will of his parents violates the Social Security Act.*—The obvious intent of Sections 601, et seq. of the Social Security Act is to provide assistance only to needy children. In particular, see Sections 601, 602(a) (7), and 606(a). See also, King v. Smith, 392 U.S. at pages 319-320, 88 S.Ct. 2128, standards of need are determined by the states (Sections 601 and 602(a) (7), note 14, King v. Smith, *supra.* The state-determined need of Samuel Davis, Jr. is $11.50 a month (Section 2310, North Carolina Department of Social Services Welfare Programs Manual), 86% of which AFDC would provide. The child's income is $43.33 a month. He is therefore ineligible for AFDC and his inclusion in the Gilliards' AFDC budget (at least, in the absence of parental consent) is violative of the Social Security Act.

(c) *The inclusion of support payments belonging to Samuel Davis, Jr. as a resource available to the entire family works an unlawful appropriation of the funds of both father and son, and violates the intent and meaning of the federal statute and the North Carolina regulations themselves.*—As previously noted, the *North Carolina Department of Social Services Welfare Programs Manual,* Section I(B) of the Section 2321, does not require assimila-

tion of resources available only to individual members of the family, but requires simply that income and contributions regularly available *"to the family"* be considered. The defendants appear to have overlooked this, their own regulation, in deciding the Gilliard case. They also appear to have overlooked the limitations of 42 U.S.C., Section 602(a) (7) which, as we read it, authorizes state agencies administering the plan to consider resources of a child in determining the needs *of the child*, but does not require nor authorize that the resources available only to a child living in the home should be treated as resources available to the family at large.

(d) *The defendants improperly presumed that the support payments by Samuel O. Davis were available to the family at large.*—Recent decisions have made it clear that those administering aid to dependent children may not presume the availability to an AFDC family of the income of a "man in the house" or a man assuming the role of spouse or a stepfather owing no legal duty of support. King v. Smith, 392 U.S. 309, 88 S.Ct. 2128 (1968); Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970); Solman v. Shapiro, 300 F.Supp. 409 (D.Conn., 1969) (affirmed 396 U.S. 5, 90 S.Ct. 25, 24 L.Ed.2d 5 (1969)). If the income of an individual with no legal duty of support is not available to the family, then on like principle the contribution to the support of Samuel Davis, Jr. by one having no legal duty to support the rest of the family can not be considered a resource available to that family.

CONCLUSION

Both under the most rational interpretation of 42 U.S.C., Section 602(a) (7), and under the State's own regu-

lations, it is improper to include as family resources support payments belonging individually to Samuel Davis, Jr. Samuel Davis, Jr. is not a proper member of the group because he is not a "needy" child under the Social Security Act. The Gilliards, absent some relevant change in their family status since the evidence was taken, are entitled to a restoration of the payments at the rate of approximately $217 a month, retroactive to March, 1970, when the reduction originally took place. The defendants may not under the law reduce or continue to withhold the payment of AFDC benefits to members of the Gilliard family or any others of the class represented by the Gilliard family because of the presumed availability to an AFDC family of support payments which belong to one or more but not all of the members of that family.

NOTE: This decision, substantially arrived at earlier this year, has been reconsidered and reheard in view of Harris v. Younger, et al.; the court finds that the *Younger* cases are inapplicable to the situation presented here and do not indicate any change in the decision above outlined.

WOODROW WILSON JONES, Chief District Judge (dissenting).

The majority brushes aside the question of jurisdiction and the advisability of applying the doctrine of abstention, and reaches the merits of this case. It then proceeds to strike down, as violative of the equal protection clause, and in contravention of the Social Security Act and State regulations, a North Carolina rule, decision or regulation relative to payments made to families under the program known as Aid for Families with Dependent Children (AFDC). With such decision, I respectfully dissent.

There is a grave question of jurisdiction involved here. Plaintiffs bottom their action on 42 U.S.C.A., 1983, and 42 U.S.C.A., 601, et seq., and allege jurisdiction exists under 28 U.S.C.A., 1343(3) and 1343(4). The defendants move to dismiss for lack of jurisdiction over the subject matter, and cite and rely upon Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, and the Second Circuit cases of Eisen v. Eastman, 421 F.2d 560 (2 Cir.1969), and McCall v. Shapiro, 416 F.2d 246 (2 Cir.1969).

Justice Stone's formulation set forth in Hague v. C.I.O. *supra,* declaring that the special jurisdictional statute, 28 U.S.C.A., 1343(3) applies "Whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights", is apparently regarded as the law in the Second Circuit. In *Eisen,* Judge Friendly, in speaking for the court said: "We therefore hold, although with a good deal less than complete assurance, that Justice Stone's *Hague* formulation, generously construed, should continue to be regarded as the law of this circuit. Since the complaint here alleged only the loss of money, the district court's conclusion that jurisdiction under the Civil Rights Act was not established, although predicated on a wrong reason, was thus correct." In *McCall,* the Second Circuit held, with Judge Smith writing the opinion: "It is reasonably clear then that Section 1343(3) and (4) dealing with statutes providing for 'equal rights' and 'civil rights' were aimed at questions of personal liberty rather than property matters, and that the latter are relegated to the general provisions of 28 U.S.C. § 1331(a)."

Justice Stone's formulation has been recognized as the law in this circuit. On March 2, 1971, in the case of Garren

v. City of Winston-Salem, 439 F.2d 140 (4th Cir.1971), the court declared:

> "But we are nevertheless convinced by the heavy weight of the case law that plaintiffs have not stated a claim cognizable under Section 1983 for which jurisdiction is conferred by Section 1343(3). The language of Section 1983 granting redress for the deprivation of any right, privilege or immunity has been consistently construed to embrace only a right, privilege or immunity pertaining to 'personal liberty, not dependent for its existence upon the infringement of property rights,' i.e. see Hague v. Committee for Industrial Organization, 307 U.S. 496 at 531, 59 S.Ct. 954 at 971, 83 L.Ed. 1423 (Mr. Justice Stone's opinion); Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir.)"

In *Weddle,* the court held:

> "Where, as here, the infringement is one solely of property rights, § 1331 is the applicable jurisdictional statute, and jurisdiction may be sustained only upon satisfaction of the amount in controversy requirement." See Howard v. Higgins, 379 F.2d 227 (10th Cir.1967); Ream v. Handley, 359 F.2d 728 (7th Cir.1966); Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969); Abernathy v. Carpenter, 208 F.Supp. 793 (W.D. Mo.1962), affirmed 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409.

There is indeed a strong argument that the basis of plaintiffs' complaint is an alleged denial of property rights and therefore not cognizable under Section 1983.

The Social Security Act, 42 U.S.C.A., 601, et seq. is a law of the United States securing to its citizens certain rights, privileges or immunities and a cause of action would accrue in favor of the plaintiffs, if these rights

and privileges were deprived under color of any state law, rule or regulation. However, it appears that such claims must meet federal "question" jurisdictional requirements of 28 U.S.C.A., 1331(a). The difference between the actual payment and the demands of the plaintiffs is only a few dollars per month and the total sum of this difference during the dependency of the minor plaintiffs would not equal the required jurisdictional amount. The jurisdiction of federal courts is determined by the Congress and not by the personal sympathies of judges.

I am not inadvertent to King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968) and the other cases cited and relied upon by the majority for jurisdictional purposes. While all four cases deal with the welfare matters the applicability of the Civil Rights Act was neither challenged nor discussed. *King* was decised before *Eisen* and the Second Circuit distinguished the cases. However, in all candor I must admit that an inference may be drawn from these four Supreme Court decisions indicating jurisdiction in the case at bar, so, assuming arguendo, that this court has jurisdiction, we then come face to face with the doctrine of abstention.

The plaintiffs set forth in their brief the four conditions proposed by the American Law institute which must be fulfilled before the abstention doctrine applies. These conditions are:

> "(1) That the issues of state law cannot be satisfactorily determined in the light of the state authorities;
>
> "(2) That abstention from the exercise of federal jurisdiction is warranted either by the likelihood

that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of state policies by a decision of state law at variance with the view which may ultimately be taken by the state court, or by other circumstances of like character;

"(3) That a plain, speedy and efficient remedy may be had in the courts of such state, and

"(4) That the parties' claim of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the state court decision by the Supreme Court of the United States." ALI Study-1969.

It is apparent to me that this case satisfied all four conditions. The Supreme Court in the case of Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68, recently reversed a three-judge court decision which had proceeded to strike down as unconstitutional certain fishing laws of the State of Alaska. The court declared:

"A state court decision here, however, could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship. * * * We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions."

More recently, the Supreme Court in Department of Social Services of Iowa v. Dimery, 398 U.S. 322, 90 S.Ct. 1871, 26 L.Ed.2d 265 (1970), vacated the judgment and remanded to the district court for reconsideration in light of Reetz v. Bozanich, *supra,* a decision where in the district court had declared a regulation of the State of Iowa un-

constitutional which restricted eligibility for medical assitance under the AFDC law.

Admittedly, the question involved here has constitutional ramifications for it is difficult to find many legal problems these days which do not. There were constitutional questions involved in *Reetz* and *Dimery*—matters of due process and equal protection of the law. But in those cases as in the case at bar, the basic questions were property rights. While these rights and all other basic rights are protected by the Constitution, it does not follow that the federal courts must, or have authority to ajudicate all controversies in the land. If the federal courts attempt to settle all disputes involving aid to dependent children and other welfare matters, there will be no time or room for anything else.

The plaintiffs apparently exhausted their administrative remedies but did not pursue their judicial remedies in state court. The majority recognizes a state law question dealing with property rights, and decides it. There is no reason shown in this record to indicate that the state courts could not adjudicate both the constitutional and state law questions raised in this complaint. I would without hesitation apply the doctrine of abstention, and, as Justice Douglas said in *Reetz,* let the parties repair to the state courts for a resolution of this matter.

However, if the merits are reached, the case of Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), is decisive of this controversy. In *Dandridge* a three-judge court struck down as violative of the equal protection clause, a Maryland plan of aid to dependent children which contained a maximum grant regardless of

the number of children in the family. The Supreme Court *reversed,* saying:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369." "* * * 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393."

Here the plaintiffs contend it unfair and unconstitutional for the State to consider the payment made by the plaintiff, Samuel Davis, for the support of his son, Samuel Davis, Jr., a resource available to the entire Gilliard family. This rule results in a lower payment from AFDC funds to the Gilliard household. The record shows that no objections were made by plaintiffs, Gilliard and Davis, when the decision was made to consider Samuel Davis, Jr., a part of the entire family for the payment of past, present and future hospital and medical bills. But now, to include his support payments as a resource of the entire family, they say, raises serious constitutional questions, requiring the convening of a three-judge court to strike down the practice and regulation. As the court said in *Dandridge*:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system

could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287. But the constitution does not empower theis court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.'

Here there is a "reasonable basis" for the regulation and it can clearly be justified. The need of dependent children is an evergrowing problem and there is a limited amount of funds. There is a legitimate state interest in allocating the available public funds in such a way as to meet the needs of the largest possible number of dependent children and families. The regulation is wholly free of any invidiously discriminatory purpose or effect.

If the merits are reached by this court, *Dandridge* directs that the action be dismissed.

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD, LORETTA GILLIARD, THOMAS GILLIARD, DANA GILLIARD, GREGORY GILLIARD, REGINALD GILLIARD, and SAMUEL DAVIS JR. GILLIARD, minors by their mother and next friend, BEATY MAE GILLIARD; on behalf of themselves and all others similarly situated,

Plaintiffs,

—vs—

CLIFTON M. CRAIG, individually and as North Carolina Commissioner of Social Services; NORTH CAROLINA BOARD OF SOCIAL SERVICES, a public body corporate; JOHN R. JORDAN, JR., MRS. THOMAS E. MEDLIN, MRS. NEIL J. GOODNIGHT, DR. BRUCE B. BLACKMON, SARAH AUSTIN, TROY H. THOMPSON and ROBERT L. LYDAY, individually and as members of the North Carolina Board of Social Services; WALLACE H. KURALT, individually and as Mecklenburg County Director of Social Services; and MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendants,

JUDGMENT

(Filed December 13, 1971)

This cause having come on for hearing on the 5th day of November, 1970, and the 21st day of May, 1971, and the Court having found that Aid to Familiies with Dependent Children (AFDC) benefits have been wrongfully withheld by the Defendants from the Plaintiffs and the

members of the class which they represent, it is Ordered, Adjudged and Decreed as follows:

INDIVIDUAL RELIEF

1. That the Defendants, their officers, agents, servants and employees, and those persons acting under, or in concert with them, be and they hereby are permanently restrained and enjoined from directly or indirectly:

    A. Including, or continuing to include, as family resources, support payments belonging individually to Samuel Davis, Jr.

    B. Withholding, or continuing to withhold, reducing, or continuing to reduce, the payment of AFDC benefits from the members of the Gilliard family, because of the presumed availability to the family group of support payments available only to Samuel Davis, Jr.

2. That the Defendant, its officers, agents and employees restore to Plaintiff Beaty Mae Gilliard payments of $217.00 per month retroactive to March, 1970, at the rate of $43.00 per month.

CLASS RELIEF

2. *Definition of the class.* For purposes of relief, the class is defined as all those persons who have been or may be subject to reduction, termination or denial of AFDC benefits based upon the unconstitutional or illegal claim of credit by administering agencies for outside income and other resources available to some, but not all, of the family group.

3. *Prospective Relief.* It is further Ordered, Adjudged, and Decreed that the Defendants, their officers, agents, servants, employees, and those persons acting under or in concert or participation with them, be, and they hereby are restrained and enjoined from directly or indirectly reducing, or continuing to reduce, withholding, or continuing to withhold, the payment to AFDC beneficiaries of any funds on the basis of crediting outside income or resources of one or more members of the family group without first determining that such income is legally available to all members of the family group.

4. *Retroactive Relief.* It is further Ordered, Adjudged, and Decreed that the Defendants shall pay to the members of the class benefits which they would have received but for the unlawful reduction, termination, or denial dating from March, 1970, the date of the final administrative action by the commissioner in the named Plaintiffs' case.

5. *Procedure for Determination of the Class.* It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services shall file with the Court and provide a copy to counsel for the Plaintiffs the following lists:

   A. The names and addresses of all those persons deemed by the Defendant to be owed money under the terms of the judgment, indicating the amount of money owed and the reason for payment.

   B. The names and addresses of all those persons to whom benefits have been denied, reduced or

terminated since March, 1970, because of income deemed available to all members of the family group, but which, under the terms of the judgment was available to some, but not all, of the family group. This list shall specify as to each recipient the kind of action taken, the reason for the action, the effective date of the action, and the amount of money involved.

6. *Procedure for Notification of the Class.* It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services, its officers, employees or agents, shall, on or before Sixty Days (60) from the date of this Judgment, notify all AFDC recipients of this Judgment. The notice shall be in the form of the letter attached to this Judgment, an Exhibit "A" and shall explain the terms of the judgment in simple language. The notice shall include the provision that if the recipient feels that he or she has a right to reimbursement, he or she has a right to appeal for those payments retroactive to March, 1970, within Sixty Days (60) of the date of the notice. The notice shall also include a form returnable to the North Carolina Department of Social Services on which such claimants may indicate their desire to appeal.

7. It is further Ordered, Adjudged, and Decreed that the North Carolina Department of Social Services, its officers, agents, and employees, shall, upon receipt of such appeal, in accordance with this Judgment, and the applicable federal and state regulations, determine the entitlement of each such appellant to the restoration

of payments retroactive to March, 1970, or the date of the original determination.

Dated: December 10, 1971.

/s/ James B. McMillan,
United States District Judge
For the Court

EXHIBIT "A"

TO: *All AFDC Recipients*

In June of this year the Federal District Court in Charlotte decided a case which may give you the right to increased benefits.

The Court decided that the Department of Social Services could not reduce the grant of an AFDC recipient with 7 children who was receiving support from the father of the seventh child who was not the father of any of the other children. The reason the Department of Social Services had reduced the grant was that it was counting the support payments as a general resource available to the whole family, when legally the recipient had to apply it only to the child who was entitled to it.

This decision may affect people who have outside income (such as support payments) which has been credited by the Department of Social Services to reduce, deny, or terminate a welfare check to AFDC beneficiaries.

If you have outside payments made to you which legally are to be used for less than all members of your family and the Department of Social Services has counted the money as being available to all members of the family, then the Department of Social Services will make over your budget so that the outside money will be counted as income only for those members of your family who are legally entitled to receive it.

If you have any questions about this letter or whether you come within this group, contact your caseworker or the nearest Legal Aid office.

If you think you have had your payments reduced, terminated or denied at any time since March, 1970, because the Department of Social Services has counted income which it should not have counted, fill in the enclosed appeal form and return it to your local Department of Social Services. If you have any questions as to whether you come within this group, contact Gail Barber, Legal Aid Society of Mecklenburg County, 1101 Statesville Avenue. Charlotte, North Carolina 28206, (704) 376-6591.

Beaty Mae GILLIARD, et al., Plaintiffs,

v.

Phillip J. KIRK, et al., Defendants.

Civ. A. No. 2660.

United States District Court,
W.D. North Carolina,
Charlotte Division.

Aug. 9, 1985.

Upon defendants' motion for a three-judge court to hear merits of plaintiffs' motion for further relief and defendants' motion for relief from judgment in action challenging constitutionality of defendant's practice of calculating AFDC benefits, the District Court, McMillan, J., held that savings clause of statute repealing three-judge panel procedure did not apply to plaintiffs' motions for further relief and defendants' motion for relief from judgment, which raised issue of effect and constitutionality of 1984 amendment to Social Security Act.

Motion denied.

Shelley Blum, Donald A. Gillespie, Jr., Marvin B. House and James A. Long, IV, Legal Aid Soc. of Mecklenburg County, Charlotte, N.C., Jane R. Wettach, East Cent. Community Legal Services, Raleigh, N.C., Lucie E. White, Jean M. Cary, Civil Legal Assistance Clinic, UNC School of Law, Chapel Hill, N.C., for plaintiffs.

James O. Cobb, Ruff, Perry, Bond, Cobb & Wade, Charlotte, N.C., for defendants Kuralt and Mecklenburg County Dept of Social Services.

L.P. Covington, Staff Atty., and Steven Shaber, North Carolina Dept. of Justice, Raleigh, N.C., for all other defendants.

ORDER

McMILLAN, District Judge.

Defendants have filed a motion for a three-judge court, pursuant to 28 U.S.C. § 2281, repealed in 1976, to hear the merits of plaintiffs' motion for further relief and defendants' motion for relief from judgment. At the time this case was heard and judgment was entered in 1971, 28 U.S.C. § 2281 provided:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by the administrative board or commission acting under state statute, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

The present statute requiring three-judge courts in certain voting rights cases does not apply. 28 U.S.C. § 2284.

The complaint was filed on May 5, 1970. The case was assigned to this judge, who requested a three-judge court to decide the merits of the case, pursuant to 28 U.S.C. § 2281. The complaint raised constitutional challenges to defendants' practice of calculating AFDC (Aid to Families with Dependent Children) benefits by presuming that child support payments belonging to one or more, but not all, members of the family were available to the entire family.

After a hearing on the merits, the three-judge court, two to one, held that defendants' practice violated the Social Security Act. An injunction was entered against defendants. The decision was affirmed by the Supreme Court on direct appeal in 1972, *Gilliard v. Craig,* 331 F. Supp. 587 (W.D.N.C.1971), 409 U.S. 807 (1972). The constitutional grounds raised by plaintiffs were never reached by the court; the decision was made on statutory grounds only. Therefore, in retrospect, the three-judge court was not required for the decision that was made, although it was warranted by the *constitutional claims.*

This court entered an order on October 17, 1974, finding that defendants had complied with the injunction.

There was no activity in the case between October of *1974* and May 30, *1985,* when plaintiffs filed a motion for further relief, raising both statutory and constitutional grounds. Plaintiffs allege that defendants have resumed the enjoined practice. Defendants have moved for relief from the judgment, arguing that an amendment to the

Social Security Act, effective October 1, 1984, 42 U.S.C. § 602(a)(38), requires them to reinstitute the enjoined practice. Plaintiffs say that the statute does not require such a result and that if it does, the statute is unconstitutional.

Defendants contend that because a three-judge court decided the issues in the original proceedings, only a three-judge court can decide subsequent questions in this action. They rely upon that portion of the legislation repealing 28 U.S.C. § 2281, which states that the repeal does not "apply to any action commenced on or before the date of enactment." Pub.L. 94-381, § 7, 90 Stat. 1120, quoted in *United States v. State of Texas*, 523 F.Supp. 703, 728 (E.D.Tex.1981).

The legislative history of the repealing bill shows a thorough dissatisfaction with the operation of three-judge courts, finding the procedure to be confusing and inefficient. The Senate report states that "three-judge court procedure has recently been termed by one scholar, 'the single worst feature in the Federal judicial system as we have it today.' It has imposed a burden on the Federal courts and has provided a constant source of uncertainty and procedural pitfalls for litigants." Leg. History, Act of August 12, 1976, Pub.L. 94-381, 1976 U.S.Code of Cong. and Ad.News (90 Stat.), pp. 1988-89.

The Senate reports explains the savings clause as follows:

> This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill *shall proceed*

> *to final disposition under the law existing on the date they were commenced.* (Emphasis added.)

Id. at 2001.

The Supreme Court *in dicta* has characterized the savings clause as applying to actions "filed before repeal" on or before the date of enactment *(Rostker v. Goldberg,* 453 U.S. 57, 62, n. 2, 101 S.Ct. 2646, 2650, n. 2, 69 L.Ed.2d 478 (1981)) and alternatively to actions "pending" on the date of repeal *(Morales v. Turman,* 430 U.S. 322, n. *, 97 S.Ct. 1189, n. *, 51 L.Ed.2d 368 (1977)). Defendants are correct that technically this action was "commenced" and that suit was filed prior to 1976. However, it can be said to have been "pending" in 1976. The case had reached final disposition in 1972, when the Supreme Court affirmed the decision of the three-judge court. An order finding compliance was filed in 1974. There was no activity between 1974 and 1985. Given the legislative history showing an intent to allow commenced actions to proceed to *final disposition* under the law at the time of filing, the court concludes that the savings clause does not apply to this action, in which final disposition was made in 1972.

This interpretation of the savings clause is consistent with case law. *See, e.g., United States v. State of Texas, supra; Concerned Citizens of Vicksburg v. Sills,* 567 F.2d 646 (5th Cir.1978). *Citizens of Vicksburg* is especially instructive for this case. The court there remanded a decision of a three-judge court which had dismissed the complaint. However, because the appellate decision was made after the repeal of 28 U.S.C. § 2281, the court noted that a single judge could address the issues on remand. *Citizens of Vicksburg,* 567 F.2d at 648, n. 1. The cases cited by

defendants, *see, e.g., Rostker, supra; Gary-Northwest Indiana Women's Service v. Bowen,* 496 F.Supp. 894 (N.D. Ind.1980), *aff'd.* 451 U.S. 934, 101 S.Ct. 2012, 68 L.Ed.2d 321 (1981), do not squarely address the issue of the application of 28 U.S.C. § 2281 to cases in which a *final judgment* was entered prior to the repealing legislation.

The issue raised in the present motions, the effect and constitutionality of a 1984 amendment to the Social Security Act, was, of course, never raised before the three-judge court sitting in 1971. The fact that the issue now presented could not have been considered at the time of the repeal of 28 U.S.C. § 2281 in 1976 further militates against applying the savings clause to the present dispute. *See, e.g., United States v. State of Texas,* 523 F.Supp. at 728, n. 11.

This case was not pending at the time of repeal of 28 U.S.C. § 2281, and the issues now raised were never before the three-judge court nor were they addressed by the three-judge court. Legislative history and case law show that the savings clause relied upon by defendants should be applied narrowly. The court therefore finds that a three-judge court is not required for the present motions.

IT IS THEREFORE ORDERED that defendants' motion for a three-judge court pursuant to 28 U.S.C. § 2281 is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

BEATY MAE GILLIARD; et al.

v.

PHILLIP J. KIRK, Sec., N. C. Department of Human Resources, et al defts and
OTIS R. BOWEN, M.D. Sec. of U. S. Dept. of Health and Human Services.

JUDGMENT IN A CIVIL CASE

(Filed July 14, 1986)

CASE NUMBER:

Civil Action No. 2660

[ ] *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered is verdict.

[X] *Decision by Court.* This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is hereby entered in accordance with the Final Order of this court filed the 3rd day of July, 1986.

July 14, 1986
Date

Thomas J. McGraw
Clerk

/s/ Mildred L. Leazer
(By) Deputy Clerk

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated,

Plaintiffs,

—vs—

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY McCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants and
Third-Party Plaintiffs,

—vs—

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services,

Third-Party Defendant.

FINAL ORDER

(Filed July 3, 1986)

A hearing on plaintiffs' motion for further relief and state defendants' motion for relief from judgment was held on September 18, 1985. After full consideration of the contentions of all parties, this court issued a memorandum of decision on May 7, 1986, finding plaintiffs entitled to full relief. Pursuant to that memorandum of decision, the court now enters the following order:

Class Definition

1. For purposes of relief, the class is defined as all those persons who have been or may be subject to reduction, termination or denial of AFDC benefits based upon the unconstitutional or illegal claim of credit by administering agencies for child support income available to some, but not all, of the family group. In addition, this class includes all those persons who were unlawfully included in the AFDC standard filing unit and involuntarily required to assign their child support rights to the state, thereby losing the use and benefit of some or all of that child support.

Prospective Relief

2. State defendants, their officers, agents, servants, employees and those persons acting under or in concert or participation with them, are hereby restrained and enjoined from enforcing any and all statutes, regulations, rules or policies that require an AFDC applicant or recipient to include in the AFDC application all children living with the applicant or recipient when that would require the inclusion of children who receive adequate child support and would not otherwise be included in the AFDC unit. The state defendants are also restrained and enjoined from counting the income of children not voluntarily included in an assistance application as income available to the AFDC unit.

3. State defendants are likewise enjoined from enforcing any statutes, regulations, rules or policies that require an AFDC applicant or recipient to assign to the state a child's rights to receive child support unless the applicant wishes to obtain AFDC for that child.

Retroactive Relief

4. State defendants are ordered to pay to the members of the class the AFDC benefits they would have received but for the unlawful reduction, termination or denial from October, 1984, to the present. State defendants will also return all child support members of the class would have received but for the unlawful inclusion of these children in the AFDC standard filing unit and subsequent assignment of their child support to the state, from October, 1984, to the present.

5. State defendants are required, within sixty (60) days of the date of this order, to identify all members of the plaintiff class as defined in paragraph 1 of this order.

6. Upon identification of members of the class, the state defendants shall immediately file with the court a list of all persons identified, including each person's name and address. This list will include all persons receiving AFDC for whom a child support obligation exists. State defendants shall provide a copy of this list to counsel for the plaintiffs.

7. Within thirty (30) days of the filing of the list described herein, state defendants shall make a retroactive payment of all amounts due to the identified class members who have remained on AFDC and for whom defendants have sufficient information to calculate the appropriate payment. At the time this payment is authorized, defendants shall send a notice to the recipient explaining the nature of and reason for the payment. The notice shall explain to the recipient that children receiving child support may be excluded from the AFDC grant, and that to exercise this option the recipient should contact his or her

case worker. This notice shall be drafted in consultation with plaintiffs' counsel.

8. At the time of filing the list described in paragraph 6, the state defendants shall send a separate notice to all persons on the list who are not affected by paragraph 7, that is, those persons whose AFDC was denied or terminated as a result of the standard filing unit and for whom insufficient information is known to calculate the appropriate retroactive benefit. This notice, which shall be drafted in consultation with plaintiffs' counsel, shall explain the court's decision and notify the recipients that they may be entitled to a retroactive benefit. The recipients shall also be told that they may reapply for AFDC benefits for any of their children, without the requirement that children receiving child support be included. This notice shall urge the recipients to contact the county Department of Social Services as soon as possible to learn what information is required to calculate the retroactive benefit. When contacted by the recipient, the county shall immediately give notice to the recipient of the specific items of verification needed to calculate the retroactive benefit. The recipient shall have ninety (90) days from the receipt of such notice to provide the required information.

Ninety days after the initial notice is mailed, state defendants shall send a second notice to those persons who have not responded, or who have failed to provide all necessary verifications. This notice, which shall be drafted in consultation with plaintiffs' counsel, shall allow recipients an additional ninety days to provide necessary information upon a showing of good cause.

9. Within thirty (30) days of receipt by the county Department of Social Services of all information necessary to calculate a recipient's retroactive benefit, the state defendants shall pay the recipient. In cases of unusual complexity, this deadline may be extended to sixty (60) days. If the defendants determine that no payment is due, they shall send a notice to this effect to the recipient within thirty (30) days of the recipt of all required information.

10. In addition to the notice, signs shall be printed and displayed and public service announcements made to insure that all persons affected by this order have the opportunity to make a claim for retroactive benefits. State defendants shall consult with plaintiffs' counsel in the drafting and publication of these signs and public service announcements.

11. At the time each payment is authorized, state defendants shall send a notice explaining why the payment is being made, the months for which payment is made and the amount of payment for each month. Reasons for noneligibility for payment will also be explained. The notice will inform recipients that there is a right to appeal the decision of the county. This appeal right shall be governed by the procedures set out in Section 2640 of the North Carolina AFDC manual. The notice shall also specify that free legal advice is available and the toll free CARELINE number will be provided to assist in obtaining this advice.

12. The state defendants are enjoined from counting any money received pursuant to this order as income or resources for the purposes of determining AFDC or Medicaid eligibility.

13. The third-party defendants are enjoined from requiring state defendants mandatorily to include the parent and all children living in the household in the assistance unit and from requiring child support income received from the legally obligated parent of one of the children to be included in determining financial eligibility for the rest of the family members.

14. Third-party defendants are required to participate financially by paying the federal share of any payments required of state defendants as a result of this decision.

15. The third-party defendants are enjoined from requiring state defendants to count any money received pursuant to this order as income or resources for purposes of determining AFDC or Medicaid eligibility.

16. The plaintiffs' motion for further relief is hereby GRANTED and the plaintiffs are entitled to costs and attorney fees.

17. The state defendants' motion for relief from judgment is hereby DENIED.

This 30 day of June, 1986.

/s/ James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
Charlotte Division
Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated,

Plaintiffs,

-vs-

PHILIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY McCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants and
Third-Party Plaintiffs,

-vs-

OTIS R. BOWEN, M.D., Secretary United States Department of Health and Human Services,

Third-Party Defendant.

ORDER

(Filed August 25, 1986)

Motions filed by the state defendants and by the federal third party defendant ask this court to reconsider

its decision in this case in light of *Lyng v. Castillo,* 54 U.S.L.W. 4864 (June 27, 1986). In *Lyng,* the Supreme Court determined that the federal food stamp program's determination of eligibility and benefit levels on a household rather than an individual basis was constitutional. The statutory distinction between parents, children and siblings and all other groups of individuals had been challenged as a violation of the equal protection element of the Due Process Clause of the Fifth Amendment. However, the Supreme Court found that it was reasonable to distinguish between parents, children and siblings and all other more distantly related relatives living in a group. To the Supreme Court, this distinction was based on rational congressional assumptions about family living patterns and did not "directly and substantially" interfere with family living arrangements, thereby burdening a fundamental right.

Lyng does not control this case and does not necessitate reconsideration or revision of this court's previous conclusions regarding the constitutionality of the SFU/DEFRA plan.

First, *Lyng* focused on the claims of persons challenging the diminution or elimination of a government benefit. The case before this court addresses the clearly distinguishable claim of a different group, persons whose private property, child support, has been taken by the government as a condition of other children's eligibility for government benefits. (See discussion of this distinction at pp. 55-56 of this court's memorandum of decision.) Although governmental action affecting eligibility requirements and benefits levels in government entitlements programs generally receives the minimal scrutiny of rational-

ity review, action affecting private property has traditionally been subjected to a more demanding examination as it was in the present case.

This case can also be distinguished from *Lyng* due to the severity of the deprivation imposed and that deprivation's documented effect on family associational rights. In terms of the deprivation, this case appears to bear a greater resemblance to *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) than to *Lyng*. In summarizing the *Moreno* decision in footnote 3 of the *Lyng* opinion, the Supreme Court wrote that *Moreno:*

> . . . held that the definition of the term "household" in the Food Stamp Act as amended in 1971, 84 Stat. 2048, was unconstitutional. That definition drew a distinction between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. Unlike the present statute, the 1971 definition *completely disqualified* all households in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program. [Emphasis added.]

Like the classification invalidated in *Moreno,* the SFU/DEFRA plan renders an entire family ineligible for needed benefits. Here, the family will receive no money if one half-sibling has a separate source of income in the form of child support and that child lives with a mother or caretaker who refuses to assign the child's income to the state.

In *Moreno,* the Supreme Court wrote:

> . . . in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desparately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

413 U.S. at 538 (emphasis in original). Analogously here, the children penalized by the implementation of the SFU regulations are persons who are not free to change their living arrangements to preserve or augment their income and for whom such a change might be detrimental to their overall well-being. Neither set of children, those with child support income and those who are totally dependent on AFDC, should be faced with a choice between parental relationships and financial survival. Thus, the nature of the deprivation and that deprivation's effect on family autonomy differentiate this case from *Lyng* and render *Lyng's* analytical framework inapplicable to this controversy.

The motions of the state defendants and the federal third party defendants for reconsideration are therefore DENIED.

IT IS SO ORDERED, this 22 day of August, 1986.

/s/ James B. McMillan
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, et al.,

Plaintiffs,

v.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants-Third Party
Plaintiffs,

v.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, in his official capacity,

Third-Party Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 1, 1986)

NOTICE IS HEREBY GIVEN that the Defendants-Third Party Plaintiffs hereby appeal to the Supreme Court of the United States from the final Order filed in this action on July 3, 1986 and the final judgment entered on July 14, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

This the 31st day of July, 1986.

LACY H. THORNBURG
Attorney General

/s/ Catherine C. McLamb
Associate Attorney General

/s/ Lemuel Hinton
Assistant Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4618

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, et al.,

Plaintiffs,

v.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY MCCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants-Third Party
Plaintiffs,

v.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, in his official capacity,

Third-Party Defendant.

AFFIDAVIT OF SERVICE BY MAIL

I, Catherine C. McLamb, declare:

That I am a citizen of the United States of America; that I am a resident and employed in Wake County, North Carolina; that my business address is North Carolina Department of Justice, Attorney General's Office, P.O. Box 629, Raleigh, North Carolina 27602; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the North Carolina Attorney General, Lacy H. Thornburg, who is a member of the Bar

of the United States District Court for the Western District of North Carolina, at whose direction the service by mail described in this Affidavit was made; that I am a member of the Bar of the United States Supreme Court; that on *July 31, 1986,* I deposited in the United States Mails, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

addressed to:

Charles E. Lyons
Assistant United States Attorney
Federal Building, Room 248
401 West Trade Street
Charlotte, North Carolina 28202

Edgar M. Swindell
Assistant Regional Counsel
101 Marietta Tower, Suite 521
Atlanta, Georgia 30323

Jane R. Wettach, Esquire
East Central Community Legal Services
Post Office Drawer 1731
Raleigh, North Carolina 27602

Lucie E. White, Esquire
1709 Dilworth Road West
Charlotte, North Carolina 28203

Jean M. Cary, Esquire
University of North Carolina School of Law
Van Hecke-Wettach Hall 064A
Chapel Hill, North Carolina 27514

The Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

at their last known address at which place where is a delivery service by United States Mails. It is certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

This Certificate is executed on *July 31, 1986,* at Raleigh, North Carolina.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Catherine C. McLamb
Associate Attorney General

Sworn to and subscribed before me this 31st day of July, 1986.

/s/ Kathleen L. Lankford
Notary Public

My Commission Expires: 3-10-91

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, et al.,

Plaintiffs,

v.

PHILLIP J. KIRK, JR., SECRETARY,
the Department of Human Resources
In His Official Capacity, and
C. BARRY McCARTY, CHAIRMAN,
SOCIAL SERVICES COMMISSION, In
His Official Capacity,

Defendants and Third-
Party Plaintiffs,

v.

OTIS R. BOWEN, SECRETARY,
United States Department of
Health and Human Services, In
His Official Capacity,

Third-Party Defendant.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

(Filed September 2, 1986)

NOTICE IS HEREBY GIVEN that the Defendants-Third-Party Plaintiffs hereby appeal to the United States Supreme Court from the final order entered in this action on July 3, 1986 and final judgment entered on July 14, 1986; Defendants-Third-Party Plaintiffs' Motion for Reconsideration was denied by Order entered August 25, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

This the 29th day of August, 1986.

LACY THORNBURG
Attorney General

/s/ Catherine C. McLamb
Assistant Attorney General

/s/ Lemuel Hinton
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4618

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, et al.,

Plaintiffs,

v.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY McCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants-Third Party Plaintiffs,

v.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services, in his official capacity,

Third-Party Defendants.

AFFIDAVIT OF SERVICE BY MAIL

(Filed September 2, 1986)

I, Catherine C. McLamb, declare:

That I am a citizen of the United States of America; that I am a resident and employed in Wake County, North Carolina; that my business address is North Carolina Department of Justice, Attorney General's Office, P.O. Box 629, Raleigh, North Carolina 27602; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the North Carolina Attorney General, Lacy H. Thornburg, who is a member of the Bar of the United States District Court of the Western District of North Carolina, at whose direction the service by mail described in this Affidavit was made; that I am a member of the Bar of the United States Supreme Court; that on *August 29, 1986,* I deposited in the United States Mails, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

addressed to:

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Assistant United States Attorney
Federal Building, Room 248
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Charlotte, North Carolina 28202

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at their last known address at which place where is a delivery service by United States Mails. It is certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

This Certificate is executed on *August 29, 1986,* at Raleigh, North Carolina.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Catherine C. McLamb
Associate Attorney General

Sworn to and subscribed before me this the 29th day of August, 1986.

/s/ Kathleen L. Lankford
Notary Public

My Commission Expires: 3-10-91

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

Civil Action No. 2660

BEATY MAE GILLIARD, *et al.*,

Plaintiffs,

vs.

PHILLIP J. KIRK, *et al.*,

Defendants.

ORDER

(Filed August 15, 1985)

Defendants have moved to join as defendant Margaret M. Heckler, Secretary, United States Department of Health and Human Services. Alternatively, defendants have moved for leave to file a third-party complaint against the Secretary.

Plaintiffs oppose the motion to join the Secretary as a defendant, but do not oppose the motion to file a third-party complaint. As a result, defendants have withdrawn the joinder motion without prejudice to renewal.

The proposed third-party complaint seeks a declaratory judgment and an injunction against the Secretary should the court hold that defendants' current practice of calculating AFDC (Aid to Families with Dependent Children) benefits, allegedly authorized by 42 U.S.C. § 602(a)(38), is either not authorized by the statute or is unconstitutional.

The court finds that pursuant to Rule 14 of the Federal Rules of Civil Procedure, leave should be granted to file the third-party complaint. The affidavit of Jo Anne Ross shows that if the Secretary is not a *party* to this action, she may refuse to make federal contributions to payments that the court may require the present defendants to make.

The court will grant the motion for leave to file a third-party complaint and will require that the defendants immediately serve upon the Secretary copies of all documents relevant to the present controversy. The outstanding motions will be set for a hearing on the motions calendar.

The court will also order that the parties submit brief legal memoranda on the issue whether Congress can abolish, by statute, the rights of (a) persons who were class members at the time of the suit; and (b) those other persons who are now class members, as established by the final judgment in this action.

IT IS THEREFORE ORDERED:

1. That defendants' motion for leave to file a third-party complaint against Margaret M. Heckler, Secretary, United States Department of Health and Human Services, is GRANTED.

2. That defendants immediately serve upon the Secretary copies of all documents relevant to the present controversy.

3. That within twenty (20) days of the filing of this order, the parties file brief legal memoranda on the legal issues identified above.

4. That the clerk set this case for a hearing on all outstanding motions.

This 14 day of August, 1985.

/s/ James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
Civil Action No. 2660

BEATY MAE GILLIARD; SAMUEL ODELL DAVIS; LORRAINE GILLIARD; LORETTA GILLIARD; THOMAS GILLIARD; DANA GILLIARD; GREGORY GILLIARD; REGINALD GILLIARD; and SAMUEL DAVIS JR. GILLIARD, minors, by their mother and next friend, BEATY MAE GILLIARD, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, and C. BARRY McCARTY, Chairman, North Carolina Social Services Commission, in his official capacity,

Defendants and
Third-Party Plaintiffs,

vs.

OTIS R. BOWEN, M.D., Secretary, United States Department of Health and Human Services,

Third-Party Defendant.

ORDER

(Filed August 25, 1986)

Motions filed by the state defendants and by the federal third party defendant ask this court to reconsider its decision in this case in light of *Lyng v. Castillo*, 54 U.S.L.W. 4864 (June 27, 1986). In *Lyng*, the Supreme

Court determined that the federal food stamp program's determination of eligibility and benefit levels on a household rather than an individual basis was constitutional. The statutory distinction between parents, children and siblings and all other groups of individuals had been challenged as a violation of the equal protection element of the Due Process Clause of the Fifth Amendment. However, the Supreme Court found that it was reasonable to distinguish between parents, children and siblings and all other more distantly related relatives living in a group. To the Supreme Court, this distinction was based on rational congressional assumptions about family living patterns and did not "directly and substantially" interfere with family living arrangements, thereby burdening a fundamental right.

Lyng does not control this case and does not necessitate reconsideration or revision of this court's previous conclusions regarding the constitutionality of the SFU/DEFRA plan.

First, *Lyng* focused on the claims of persons challenging the dimunition or elimination of a government benefit. The case before this court addresses the clearly distinguishable claim of a different group, persons whose private property, child support, has been taken by the government as a condition of other children's eligibility for government benefits. (See discussion of this distinction at pp. 55-56 of this court's memorandum of decision.) Although governmental action affecting eligibility requirements and benefit levels in government entitlements programs generally receives the minimal scrutiny of rationality review. action affecting private property has tradition-

ally been subjected to a more demanding examination as it was in the present case.

This case can also be distinguished from *Lyng* due to the severity of the deprivation imposed and that deprivation's documented effect on family associational rights. In terms of the deprivation, this case appears to bear a greater resemblance to *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) than to *Lyng*. In summarizing the *Moreno* decision in footnote 3 of the *Lyng* opinion, the Supreme Court wrote that *Moreno*:

> . . . held that the definition of the term "household" in the Food Stamp Act as amended in 1971, 84 Stat. 2048, was unconstitutional. That definition drew a distinction between households composed entirely of persons who are related to one another and households containing one or more members who are unrelated to the rest. Unlike the present statute, the 1971 definition *completely disqualified* all households in the latter category. Not only were all groups of unrelated persons ineligible for benefits, but even groups of related persons would lose their benefits if they admitted one nonrelative to their household. We concluded that this definition did not further the interest in preventing fraud, or any other legitimate purpose of the Food Stamp Program. [Emphasis added.]

Like the classification invalidated in *Moreno*, the SFU/DEFRA plan renders an entire family ineligible for needed benefits. Here, the family will receive no money if one half-sibling has a separate source of income in the form of child support and that child lives with a mother or caretaker who refuses to assign the child's income to the state.

In *Moreno,* the Supreme Court wrote:

> . . . in practical operation, the 1971 amendment excludes from participation in the food stmp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.

413 U.S. at 538 (emphasis in original). Analogously here, the children penalized by the implementation of the SFU regulations are persons who are not free to change their living arrangements to preserve or augment their income and for whom such a change might be detrimental to their overall well-being. Neither set of children, those with child support income and those who are totally dependent on AFDC, should be faced with a choice between parental relationships and financial survival. Thus, the nature of the deprivation and that deprivation's effect on family autonomy differentiate this case from *Lyng* and render *Lyng*'s analytical framework inapplicable to this controversy.

The motions of the state defendants and the federal third party defendants for reconsideration are therefore DENIED.

IT IS SO ORDERED, this 22 day of August, 1986.

/s/ James B. McMillan
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 2660

BEATY MAE GILLIARD, et al.,

Plaintiffs,

v.

PHILLIP J. KIRK, JR., SECRETARY the Department of Human Resources In His Official Capacity, and C. BARRY McCARTY, CHAIRMAN, SOCIAL SERVICES COMMISSION, In His Official Capacity,

Defendants and Third-Party Plaintiffs,

v.

OTIS R. BOWEN, SECRETARY, United States Department of Health and Human Services, in his official capacity,

Third-Party Defendant.

ORDER

(Filed August 25, 1986)

Upon consideration of the Motion of the State Defendants for a Stay Pending Appeal and with the consent of the Plaintiffs, the Court now STAYS its Final Order of July 3, 1986, except as specified herein:

1. State Defendants are required, within sixty (60) days of the date of this Order, to identify all members of the plaintiff class as defined in paragraph 1 of the Final Order of July 3, 1986. Upon identification of members of the class, State Defendants shall file with the court a list of all persons identified, including each person's name,

address, and the effect of the standard filing unit on the case (denial, reduction, termination or involuntary inclusion of a child in AFDC unit). A copy of this list shall be provided to counsel for the Plaintiffs. Upon identification of members of the class, State Defendants shall send a Notice to these persons alerting them to the possibility of retroactive benefits. This Notice shall substantially conform to Exhibit A attached. For purposes of identifying the persons to receive this Notice, the court will presume that a child was involuntarily included in the budget unit if the child support paid for a month exceeds the $50 disregard plus the incremental increase in the AFDC grant caused by the addition of that child to the unit.

2. Beginning thirty (30) days from the date of this Order, the State Defendants shall provide a Notice to those AFDC applicants or recipients whose benefits are denied, reduced or terminated as a result of the involuntary inclusion in the AFDC budget unit of a child receiving child support and to those AFDC recipients who involuntarily included a child receiving child support in the AFDC budget unit, but who continue to receive AFDC. This Notice shall be sent at the time a person is identified as being a potential class member, which may occur at the time of disposition of the case, at the time a child support obligation is established or at the time of any other event which triggers membership in the class. For purposes of identifying the persons to receive this Notice, the court will presume that a child was involuntarily included in the budget unit if the child support paid for a month exceeds the $50 disregard plus the incremental increase in the AFDC grant caused by the addition of that child to the

unit. This Notice shall substantially conform to Exhibit B attached. The County shall document in the case file that the person was identified as a potential *Gilliard* class member, and the date on which the Notice was sent.

Every ninety (90) days, the State Defendants shall file with the Court a list of persons provided this Notice, including each person's name, address and the nature of the effect of the standard filing unit rule (denial, reduction, termination or involuntary inclusion of a child in the AFDC unit). A copy of this list shall also be provided to Plaintiffs' counsel.

3. This Court is mindful of the number of months which have elapsed since the state implemented the Standard Filing Unit rule and the number of months which may elapse prior to final resolution of this case. Procedures to verify AFDC requirements shall be developed in order to facilitate a month-by-month reconstruction of eligibility. These procedures shall be reasonable and consistent with the realities of making retroactive payments. These procedures shall be developed to assure that eligible persons will receive payment under the Final Order of July 3, 1986. These procedures shall be reviewed by plaintiff's counsel prior to implementation.

If third-party verifications cannot be obtained, the state defendants shall not withhold or delay a payment when alternative verification (such as a written statement from the client) is available. The Federal Defendant shall not penalize the state defendants or hold them at any financial risk for issuance of any payments made pursuant to the Final Order of July 3, 1986.

4. Insofar as the State Defendants' compliance with the terms of this Order require their expenditure of administrative funds, the Federal Defendant shall be required to reimburse these expenditures at the rate of fifty percent (50%).

This the 22 day of August, 1986.

/s/ James B. McMillan
District Court Judge

EXHIBIT A

READ CAREFULLY! YOU MAY BE ENTITLED TO BACK BENEFITS!

At some time since October, 1984, your AFDC application was affected by the "Standard Filing Unit" rule. This means you were required to include all your children in the AFDC application whether you wanted to or not. Our records show that one or more of your children were receiving child support, and you may have wished to exclude those children from the AFDC budget unit. You were told these children had to be in the unit and you had to sign over their child support to the state.

A lawsuit in Federal Court was filed on your behalf to allow you to choose which children would be in the AFDC budget unit. The judge ruled that you should not have to include the children receiving child support in the AFDC unit unless you want to. The case has been appealed to the United States Supreme Court.

If the United States Supreme Court rules in your favor, you may be entitled to back benefits. In order to

obtain these benefits, you will have to show the Department of Social Services that you are eligible for them. You will need to show them your income, who was living in your household and other items as far back as October, 1984 in order to get benefits. It may be more than a year before the Supreme Court decides the case.

If you have kept records about your earnings, child support paid, the persons in your household, etc., *do not throw them away!* If you have thrown them away, try to get copies of them from your employers, the court house or other places. Keep them in a safe place. In addition, you should do the following things:

1. Keep the Department of Social Services informed of your current address, even if you move to another state.
2. Keep ongoing records of all household income, such as wages, child support, etc.
3. Keep ongoing records of who lives in the household.
4. Keep all records in a safe place and do not throw them away.

You will receive further notice at the conclusion of the lawsuit if you are eligible for extra benefits.

If you have questions about this notice, call your county Department of Social Services, your local Legal Services office or CARELINE, toll free, at 1-800-662-7030.

.....

Eligibility Worker

Date .....

Distribution:
original to client
copy to case file

EXHIBIT B

READ CAREFULLY! YOU MAY BE ENTITLED TO BACK BENEFITS!

During your recent application for AFDC, you were required to include all children living with you in your budget unit. You may have wished to leave out one or more of these children because they were receiving enough child support. If you had been permitted to leave out certain children, you may have been able to keep their child support and still get AFDC for your other children.

A lawsuit in Federal Court was filed on your behalf to allow you to choose which children would be included in your AFDC unit. The judge ruled that you should not have to include the children receiving child support in the AFDC application unless you want to. The case has been appealed to the United States Supreme Court.

If the United States Supreme Court rules in your favor, you may be entitled to some back benefits. It may be more than a year before the Supreme Court makes a decision, however. In order to preserve your right to benefits, you should do the following things:

1. Keep the Department of Social Services informed of your current address, even if you move to another state.
2. Keep ongoing records of all household income, such as wages, child support, etc.
3. Keep ongoing records of who lives in the household.
4. Keep all records in a safe place and do not throw them away.

You will receive further notice at the conclusion of the lawsuit if you are eligible for extra benefits.

If you have questions about this notice, call your county Department of Social Services, your local Legal Services office or CARELINE, toll-free, at 1-800-662-7030.

.....

Eligibility Worker

Date .....

Distribution:

original to client
copy to case file

APPENDIX F

7 U.S.C. § 2012. Definitions.

* * *

(i) "Household" means (1) an individual who lives alone or who, while living with others, customarily purchases food and prepares meals for home consumption separate and apart from the others, or (2) a group of individuals who live together and customarily purchase food and prepare meals together for home consumption; except that parents and children, or siblings, who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so, unless one of the parents, or siblings, is an elderly or disabled member. Notwithstanding clause (1) of the preceding sentence, an individual who lives with others, who is sixty years of age or older, and who is unable to purchase food and prepare meals because such individual suffers, as certified by a licensed physician, from a disability which would be considered a permanent disability under section 221(i) of the Social Security Act (42 U.S.C. 421(i) [42 USCS § 421(i)]) or from a severe, permanent, and disabling physical or mental infirmity which is not symptomatic of a disease shall be considered, together with any of the others who is the spouse of such individual, an individual household, without regard to the purchase of food and preparation of meals, if the income (as determined under section 5(d) [7 USCS § 2014(d)])

of the others, excluding the spouse, does not exceed the poverty line, as described in section 5(c)(1) [7 USCS § 2014(c)(1)], by more than 65 per centum. In no event shall any individual or group of individuals constitute a household if they reside in an institution or boarding house, or else live with others and pay compensation to the others for meals. For the purposes of this subsection, residents of federally subsidized housing for the elderly, disabled or blind recipients of benefits under title II or title XVI of the Social Security Act [42 USCS §§ 401 et seq., or 1381 et seq.] who are residents in a public or private nonprofit group living arrangement that serves no more than sixteen residents and is certified by the appropriate State agency or agencies under regulations issued under section 1616(e) of the Social Security Act [42 USCS § 1382e(e)], temporary residents of public or private nonprofit shelters for battered women and children, and narcotics addicts or alcoholics who live under the supervision of a private nonprofit institution, or a publicly operated community health center, for the purpose of regular participation in a drug or alcoholic treatment program shall not be considered residents of institutions and shall be considered individual households.

* * *

28 U.S.C. § 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court

of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 928; Oct. 31, 1951, c. 655, § 47, 65 Stat. 726; July 7, 1958, P. L. 85-508, § 12(e), (f), 72 Stat. 348; Mar. 18, 1959, P. L. 86-3, § 14(a), 73 Stat. 10.)

* * *

42 U.S.C. § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must—

* * *

(7) except as may be otherwise provided in paragraph (8) or (31) and section 415 [42 USCS § 615], provide that the State agency—

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

(B) shall determine ineligible for aid any family the combined value of whose resources (reduced by any obligations or debts with respect to such resources) exceeds $1,000 or such lower amount as the State may determine, but not including as a resource for purposes of this subparagraph (i) a home owned and occupied by such child, relative, or other individual and so much of the family member's ownership interest in one automobile as does not exceed such amount as the Secretary may prescribe, (ii) under regulations prescribed by the Secretary, burial plots (one for each such child, relative, and other individual), and funeral agreements or (iii) for such period or periods of time as the Secretary may prescribe, real property which the family is making a good-faith effort to dispose of, but any aid payable to the family for any such period shall be conditioned upon such disposal, and any payments of such aid for that period shall (at the time of the disposal) be considered overpayments to the extent that they would not have been made had the disposal occurred at the beginning of the period for which the payments of such aid were made; and

(C) may, in the case of a family claiming or receiving aid under this part [42 USCS §§ 601 et seq.] for any month, take into consideration as income (to the extent the State determines appropriate, as specified in such plan, and notwithstanding any other provision of law)—

(i) an amount not to exceed the value of the family's monthly allotment of food stamp coupons, to the extent such value duplicates the amount of food included in the maximum amount that would be payable under

the State plan to a family of the same composition with no other income; and

(ii) an amount not to exceed the value of any rent or housing subsidy provided to such family, to the extent such value duplicates the amount for housing included in the maximum amount that would be payable under the State plan to a family of the same composition with no other income;

* * *

42 U.S.C. § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must—

* * *

(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency—

(i) shall disregard all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or a part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment;

(ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making

such determination, the first $75 of the total of such earned income for such month;

(iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditures for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);

(iv) shall disregard from the earned income of any child or relative receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, an amount equal to (I) the first $30 of the total of such earned income not disregarded under any other clause of this subparagraph plus (II) one-third of the remainder thereof (but excluding, for purposes of this subparagraph, earned income derived from participation on a project maintained under the programs established by section 432(b)(2) and (3) [42 USCS § 632(b)(2), (3)]);

(v) may disregard the income of any dependent child applying for or receiving aid to families with dependent children which is derived from a program

carried out under the Job Training Partnership Act (as originally enacted), but only in such amounts, and for such period of time (not to exceed six months with respect to earned income) as the Secretary may provide in regulations;

(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 457(b) [42 USCS § 657(b)]; and

(vii) may disregard all or any part of the earned income of a dependent child who is a full-time student and who is applying for aid to families with dependent children, but only if the earned income of such child is excluded for such month in determining the family's total income under paragraph (18);

(B) provide that (with respect to any month) the State agency—

(i) shall not disregard, under clause (ii), (iii), or (iv) of subparagraph (A), any earned income of any one of the persons specified in subparagraph (A)(ii) if such person—

(I) terminated his employment or reduced his earned income without good cause within such period (of not less than thirty days) preceding such month as may be prescribed by the Secretary;

(II) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he

is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by the employer, to be a bona fide offer of employment; or (III) failed without good cause to make a timely report (as prescribed by the State plan pursuant to paragraph (14)) to the State agency of earned income received in such month; and

(ii)(I) shall not disregard—

(a) under subclause (II) of subparagraph (A)(iv), in a case where such subclause has already been applied to the income of the persons involved for four consecutive months while they were receiving aid under the plan, or

(b) under subclause (I) of subparagraph (A)(iv), in a case where such subclause has already been applied to the income of the persons involved for twelve consecutive months while they were receiving aid under the plan,

any earned income of any of the persons specified in subparagraph (A)(ii), if, with respect to such month, the income of the persons so specified was in excess of their need, as determined by the State agency pursuant to paragraph (7) (without regard to subparagraph (A)(iv) of this paragraph), unless the persons received aid under the plan in one or more of the four months preceding such month; and

(II) in the case of the earned income of a person with respect to whom subparagraph (A)(iv) has

been applied for four consecutive months, shall not apply the provisions of subclause (II) of such subparagraph to any month after such month, or apply the provisions of subclause (I) of such subparagraph to any month after the eighth month following such month, for so long as he continues to receive aid under the plan, and shall not apply the provisions of either such subclause to any month thereafter until the expiration of an additional period of twelve consecutive months during which he is not a recipient of such aid; and

(C) provide that in implementing this paragraph the term "earned income" shall mean gross earned income, prior to any deductions for taxes or for any other purposes;

* * *

42 U.S.C. § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must—

* * *

(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

42 U.S.C. § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must—

* * *

(38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part [42 USCS §§ 601 et seq.]) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 406(a) [42 USCS § 606(a)], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 205(j) [42 USCS § 405(j)], in the case of benefits provided under title II [42 USCS §§ 401 et seq.];

* * *

42 U.S.C. § 606. Definitions

When used in this part [42 USCS §§ 601 et seq.]—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training);

* * *

N.C.G.S. § 50-13.4. Action for support of minor child.

* * *

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

* * *

N.C.G.S. § 108A-25. Creation of programs.

(a) The following programs of public assistance are hereby established, and shall be administered by the county department of social services or the Department of Human Resources under federal regulations or under rules and regulations adopted by the Social Services Commission and under the supervision of the Department of Human Resources:

(1) Aid to families with dependent children;

(2) State-county special assistance for adults;

(3) Food stamp program;

(4) Foster care and adoption assistance payments;

(5) Low income energy assistance program.

* * *

(c) The Department of Human Resources is hereby authorized to accept all grants-in-aid for programs of public assistance which may be available to the State by the federal government. The provisions of this Article shall be liberally construed in order that the State and its citizens may benefit fully from such grants-in-aid. (1937, c. 135, s. 1; c. 288, ss. 3, 31; 1949, c. 1038, s. 2; 1955, c. 1044, s. 1; 1957, c. 100, s. 1; 1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1975, c. 92, s. 4; 1977, 2nd Sess., c. 1219, s. 9; 1979, c. 702, s. 1; 1981, c. 275, s. 1.)

Part 2. Aid to Families with Dependent children.

N.C.G.S. § 108A-27. Authorization of Aid to Families with Dependent Children Program.

The Department is authorized to establish and supervise an Aid to Families with Dependent Children Program. This program is to be administered by county departments of social services under federal regulations and rules and regulations of the Social Services Commission. (1981, c. 275, s. 1.)

* * *

N.C.G.S. § 110-145. Debt to State created.

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be deter-

mined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 9, 10.)

* * *

N.C.G.S. § 110-37. Acceptance of public assistance constitutes assignment of support rights to the State or county.

By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 13.)

* * *